Mark Cordes*

Sign Regulation After *Ladue*: Examining the Evolving Limits of First Amendment Protection

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I. INTRODUCTION

Municipal efforts to regulate signs and billboards have typically presented two competing concerns to local governments. First are the perceived interests supporting regulation, most notably traffic safety and aesthetics.[1] Municipal efforts at preserving and enhancing a pleasing urban environment have become particularly important in recent years, with aesthetically based regulations becoming a major component of local land use controls. Courts have also increasingly

* Associate Professor of Law, Northern Illinois University; B.S., Portland State University; J.D., Willamette University; J.S.M., Stanford University.

1. *See, e.g.*, Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1052 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988); Lindsay v. City of San Antonio, 821 F.2d 1103, 1104 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988).

accepted aesthetics as both a legitimate and substantial state interest capable of supporting various land use regulations.[2]

Competing with the traffic safety and aesthetic concerns posed by signs and billboards are their communicative value. Not only are they a form of first amendment expression deserving of accommodation but at times serve particularly important communicative needs. Local governments might therefore determine that in some instances the communicative values outweigh the competing aesthetic and traffic concerns.[3]

For these reasons municipalities typically regulate signs and billboards in a selective fashion, seeking to accommodate communicative and First Amendment needs while furthering aesthetic and traffic safety concerns. Although this might only involve basic restrictions on size, design, and placement,[4] in many instances municipalities pursue broader restrictions which prohibit some signs while permitting others. Such a selective approach might be structured in a content-neutral fashion by limiting the type or number of signs.[5] A municipality might attempt to regulate signage further by reference to content, such as distinguishing between commercial and non-commercial speech[6] or establish exemptions within the above categories.[7]

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2. *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); State v. Miller, 416 A.2d 821 (N.J. 1980); City of Champaign v. Koger Co., 410 N.E.2d 661 (Ill. App. Ct. 1980). For a general discussion of judicial acceptance of aesthetics as within the police power, see Edward H. Ziegler, Jr., *Aesthetic Controls and Derivative Human Values: The Emerging Rational Basis for Regulation*, *in* 1986 ZONING AND PLANNING LAW HANDBOOK 239 (J. Benjamin Gailey ed., 1986); Ronald K. Aronovsky, Metromedia, Inc. v. City of San Diego: *Aesthetics, the First Amendment and the Realities of Billboard Control*, 9 ECOLOGY L.Q. 295, 300-15 (1981).
3. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981). *See also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984)(finding aesthetic interest in eliminating signs was not compromised by failing to extend ban to private property).
4. *See, e.g.*, Corey Outdoor Advertising v. Board of Zoning Adjustment, 327 S.E.2d 178 (Ga. 1985)(signs prohibited within 300 feet of historic site); City of Albuquerque v. Jackson, 684 P.2d 543 (N.M. Ct. App. 1984)(26 foot height limit on signs).
5. *See, e.g.*, Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987)(limiting portable signs); Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986)(banning portable signs); Signs, Inc. v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983)(banning portable signs); Risher v. City of Wyoming, 383 N.W.2d 226 (Mich. Ct. App. 1985)(limiting number of days that temporary signs may be displayed).
6. *See, e.g.*, Lamar-Orlando Outdoor Advertising v. City of Ormand Beach, 415 So. 2d 1312 (Fla. Dist. Ct. App. 1982)(giving a commercial/non-commercial distinction); Maurice Callahan & Sons v. Outdoor Advertising Bd., 427 N.E.2d 25 (Mass. App. Ct. 1981)(basing decision on a commercial/non-commercial distinction).
7. *See, e.g.*, Major Media of the Southeast, Inc. v. City of Raleigh, 621 F. Supp. 1446 (E.D.N.C. 1985), *aff'd*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987)(giving on site exemption and "for sale" sign exemption); National Advertising Co. v. City of Bridgeton, 626 F. Supp. 837 (E.D. Mo. 1985)(exempting political

The Supreme Court has addressed sign and billboard regulation on four occasions in the last 17 years, most recently last term in *City of Ladue v. Gilleo*.[8] In that case the Court summarized its prior decisions by stating that a sign regulation might be constitutionally invalid in two separate ways. First, a regulation may be unconstitutional when an ordinance restricts "too little" speech by creating exemptions which violate content-neutrality.[9] Conversely, an ordinance might be unconstitutional by restricting "too much" speech and thereby unnecessarily limiting expressive activities.[10] The Court proceeded to strike down the ordinance in *Ladue* on the latter ground, holding that an ordinance which prohibited homeowners from displaying any signs on their property with the exception of homeowner identification signs, "for sale" signs, and safety signs, infringed on an important form of communication.[11]

The two potential problems in sign regulation identified by the Court in *Ladue*—either restricting too little or too much speech—correspond to two fundamental themes in First Amendment jurisprudence. First is the requirement of content-neutrality, which is potentially violated when a sign ordinance exempts certain content-related signs and thus restricts "too little" speech.[12] Although the parameters of this requirement are far from clear, it has in recent years become the Supreme Court's dominant analytical tool.[13]

On the other hand, the problem of restricting speech "too much" recognizes the critical First Amendment concern that governmental regulation should not significantly restrict speech opportunities. Although speech is subject to reasonable regulations, such as regarding the time, place, or manner of expression,[14] the state cannot significantly diminish speech opportunities.[15] This concern refers not only to the potential for regulation to reduce the total quantity of speech

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signs); Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982)(listing eight exemptions); Gannet Outdoor Co. v. City of Troy, 401 N.W.2d 335 (Mich. Ct. App. 1986)(discussing political sign exemption).

8. 114 S. Ct. 2038 (1994).

9. *Id.* at 2043-44.

10. *Id.* at 2043.

11. *Id.* at 2044-46.

12. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 455-71 (1980); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

13. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616-17 (1991).

14. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981).

15. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981). *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57-71 (1987).

opportunities, but also its potential to restrict uniquely significant speech fora.[16]

Each of these two First Amendment interests place limits upon and pose potential problems for municipal efforts to pursue their aesthetic and traffic safety concerns through sign and billboard regulation. There are, of course, certain selective controls that municipalities can pursue which further aesthetic concerns while providing speech opportunities, such as restrictions on size, location, and placement of signs.[17] In most instances these would not raise either of the above First Amendment concerns, but they are limited in the aesthetic objectives they could serve. More extensive attempts at sign control often put municipalities in a dilemma, however, because certain exemptions are often desirable or even necessary, but potentially violate content-neutrality. In such situations the municipality is often faced with a choice of either permitting all signs, and thereby impede its interests, or banning all signs in a particular context. Not only does this latter choice undercut First Amendment concerns, but in some instances it might be constitutionally problematic by prohibiting "too much speech."

Although recognizing the above two concerns, the Supreme Court has given only limited guidance in steering a course between them. Most problematic in this regard is the Court's decision in *Metromedia, Inc. v. City of San Diego*,[18] where it addressed the constitutionality of a comprehensive billboard and sign ordinance. Although a majority of the Court found the particular restrictions valid as applied to commercial speech, it found the ordinance invalid as applied to non-commercial speech, without agreeing on a rationale. The decision produced five separate opinions, with only a portion of one opinion gaining a majority of the Court, resulting in few definitive principles. Similarly, the Court has provided significantly different degrees of concern for suppressive sign regulations, especially when comparing *Ladue* with its prior decision in *Members of City Council v. Taxpayers for Vincent*.[19]

In recent years there have been a large number of state and federal decisions attempting to sort out the parameters of permissible regula-

16. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981); Martin v. City of Struthers, 319 U.S. 141, 145-49 (1943); Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

17. *See, e.g.*, National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300 (Ill. App. Ct. 1990), *appeal denied*, 567 N.E.2d 333 (Ill. 1991), *cert. denied*, 501 U.S. 1261 (1991); City of Albuquerque v. Jackson, 684 P.2d 543 (N.M. Ct. App. 1984)(giving 26 foot height limit on signs).

18. 453 U.S. 490 (1981).

19. 466 U.S. 789 (1984).

tion.[20] This significant amount of litigation is due not only to the uncertainty surrounding Supreme Court decisions, but also because of the numerous regulatory approaches a municipality might use to balance the communicative and aesthetic concerns inevitably involved in billboard and sign regulation. In seeking to apply the limited principles of *Metromedia* and other cases to a vast array of possible regulations, courts have often reached conflicting results on similar issues. This is true regarding certain types of content-neutral restrictions[21] and particularly any content-related regulation.[22]

This Article will examine the evolving law of sign and billboard regulations, with particular attention to the dual concerns noted by the Court in *Ladue* of restricting "too much" speech and restricting "too little." It will address three general issues surrounding the permissible limits of sign and billboard regulation. The Article will begin by addressing *Ladue's* concern regarding regulations that restrict speech too much. In particular, it will examine the extent to which a municipality must accommodate signs or billboards.

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20. *See, e.g.*, Rappa v. New Castle County, 18 F.3d 1043 (3rd Cir. 1994); Arlington County Republican Comm. v. Arlington County, 983 F.2d 587 (4th Cir. 1993); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993); National Advertising Co. v. Town of Babylon, 703 F. Supp. 228 (E.D.N.Y. 1989), *aff'd in part and rev'd in part*, 900 F.2d 551 (2nd Cir. 1990), *cert. denied*, 489 U.S. 852 (1990); Outdoor Systems, Inc. v. City of Mesa, 819 P.2d 44 (Ariz. 1991); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52 (Colo. 1981). *See also* R. Douglas Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 MICH. L. REV. 2482 (1990)(discussing some of the inconsistent results in lower court decisions after *Metromedia*); Brad Sanders, Note, *The First Amendment "Law of Billboards,"* 30 WASH. U. J. URB. AND CONTEMP. L., 333, 353-61 (1986)(discussing confusion of post *Metromedia* cases).

21. Courts have split regarding the validity of separate restrictions on portable or temporary signs. For cases holding separate restrictions invalid, see Dills v. Cobb County, 755 F.2d 1473 (11th Cir. 1985); Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983); All American Sign Rentals, Inc. v. City of Orlando, 592 F. Supp. 85 (M.D. Fla. 1983); Signs, Inc. v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983); Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982); Risner v. City of Wyoming, 383 N.W.2d 276 (1985). For cases holding separate restrictions on portable signs valid, see Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986); Mobile Sign, Inc. v. Town of Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987); Barber v. Municipality of Anchorage, 776 P.2d 1035 (Alaska 1989), *cert. denied*, 493 U.S. 922 (1989).

22. *Compare, e.g.*, Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336 (D. Md. 1993)(finding content exemptions invalid) *and* Burkhart Advertising, Inc. v. City of Auburn, 786 F. Supp. 721 (N.D. Ind. 1991)(finding content distinctions invalid) *with* Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994)(finding limited content exemptions valid).

A second area of concern is the permissible limit of content-neutral yet underinclusive restrictions on signs and billboards. Although the Court has clearly recognized a municipality's right to place reasonable restrictions on sign and billboard use, the First Amendment implications of the activity requires some heightened scrutiny. In particular, lower courts have evenly split regarding the validity of prohibitions or special restrictions on portable or temporary signs.[23] Those decisions invalidating such restrictions have generally focused on the underinclusive nature of the restriction.

The third and final area of examination is the extent to which municipalities can create content-based distinctions in regulation. Although a majority of the Court in *Metromedia* upheld a broad form of content-regulation applied to commercial speech, the legitimacy of other content-based distinctions is less certain. On one level are possible content distinctions between commercial and non-commercial speech, which are a common component of sign ordinances but have been brought into question by the Court's recent decision in *City of Cincinnati v. Discovery Network, Inc.*[24] More problematic are content-based distinctions as applied to non-commercial speech. Although the Court has generally prohibited content-based distinctions in such situations, a close reading of the opinions in *Metromedia* indicate that five justices would allow distinctions under varying circumstances.

Part II of the Article will first examine the First Amendment framework, focusing on time, place, and manner regulations of speech and the commercial speech doctrine. Part III will then examine the decisions in which the Supreme Court has addressed restrictions on signs: *Linmark Associates v. Township of Willingboro*,[25] *Metromedia, Inc. v. City of San Diego*,[26] *Members of City Council v. Taxpayers for Vincent*,[27] and *City of Ladue v. Gilleo*,[28] synthesizing the Court's current approach to sign and billboard regulation. Parts IV, V, and VI will then address the issues discussed above.

II. THE FIRST AMENDMENT FRAMEWORK

A. Time, Place, and Manner Regulations

The Supreme Court has frequently recognized that reasonable restrictions may be placed on First Amendment conduct in order to further important non-speech interests.[29] Whereas the Court has

23. *See supra* note 21.
24. 113 S. Ct. 1505 (1993).
25. 431 U.S. 85 (1977).
26. 453 U.S. 490 (1981).
27. 466 U.S. 789 (1984).
28. 114 S. Ct. 2038 (1994).
29. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791-93 (1989); Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984).

typically scrutinized restrictions intended to suppress a particular message,[30] it has consistently stated that the state may regulate expression to promote nonspeech interests. In particular, the Court has noted that the state may regulate the time, manner, or place of expression to further important interests.[31] The general validity of such restrictions is premised on the idea that the state is not attempting to suppress speech, but instead is simply regulating where and when it will occur so as to avoid interference with other state interests.[32]

Despite the Court's general willingness to permit such restrictions, it has articulated several requirements to ensure that the restrictions properly accommodate First Amendment interests. In recent years the Court's primary requirement has been that regulation of First Amendment activity be content-neutral.[33] This concern was initially reflected in the early public forum cases where the Court struck down discretionary licensing schemes because of the possibility of viewpoint discrimination.[34] In more recent years the Court has extended the prohibition to any content-based regulation, stating that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content".[35] As a consequence, the Court has held that regardless of whether the state is required to accommodate speech in a particular place or time, once it has opened a particular forum to some speech it cannot exclude other speech contents.[36]

Despite the general concern about content-neutrality, the Court has on occasion permitted content-based distinctions in relation to subject-matter. Although the Court has not clearly articulated the circumstances in which this is allowed, it is arguably justified where distinct secondary effects are generated by particular content. For example, in *City of Renton v. Playtime Theaters, Inc.*,[37] the Court held

30. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).
31. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Kovacs v. Cooper, 336 U.S. 77 (1949).
32. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Cox v. New Hampshire, 312 U.S. 569 (1941). *See generally* MELVILLE B. NIMMER, FREEDOM OF SPEECH § 2.06 (1985).
33. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 462 (1980); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).
34. *See* Poulos v. New Hampshire, 345 U.S. 395 (1953); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovel v. City of Griffin, 303 U.S. 444 (1938).
35. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)(citation omitted).
36. For example, in Widmar v. Vincent, 454 U.S. 263 (1981), the Court held invalid a university's decision to prohibit student religious meetings on campus while permitting a number of other groups to meet. Although the Court noted that the university was not necessarily required to allow any group to meet, once it allowed some groups it could not selectively exclude others. *Id.* at 277.
37. 475 U.S. 41 (1986).

that the state could single-out adult theaters for more restrictive treatment because they were found to generate distinct, noncommunicative secondary effects.[38] The Court has similarly permitted subject-matter distinctions in other limited contexts in which particular problems were posed, at times noting captive audience concerns[39] or the non-public nature of the regulated forum.[40]

Assuming the content-neutrality of the regulation, the Court has generally articulated an intermediate standard of review of restrictions on First Amendment conduct. The Court has articulated this standard in various ways, but in recent years has stated that restrictions must serve a substantial or significant interest in a narrowly tailored manner and leave adequate alternatives for communication.[41] Although this rule suggests the application of heightened scrutiny for any restriction on speech, in practice the Court has upheld most restrictions as long as they do not pose a significant threat to effective communication.[42] In such instances the Court has recognized any asserted interest to be substantial.[43] Similarly, the Court has not closely scrutinized the precision of regulation, suggesting that the state need not pursue alternatives which would be less effective.[44]

On the other hand, the Court has closely scrutinized decisions which, though content-neutral, operate to significantly suppress speech.[45] For example, in *Schad v. Borough of Mount Ephraim*[46] the Court struck down an ordinance which prohibited all live entertainment—a form of expression. Emphasizing that the ordinance banned a form of expression and thus significantly suppressed speech opportunities, the Court said it would need to scrutinize the restriction.[47]

38. *Id.* at 48-49. *See also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992)(discussing "secondary effects" test).
39. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)(upholding ordinance which allowed commercial but prohibited political advertising on public transportation).
40. *See* Greer v. Spock, 424 U.S. 828 (1976)(banning speeches and demonstrations on a military base).
41. *See* Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-49 (1981).
42. *See generally* William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 782-92 (1986); Stone, *supra* note 15, at 50-54.
43. Stone, *supra* note 15, at 51.
44. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).
45. Dean Stone has identified this as the central concern in the Court's treatment of content-neutral regulations. *See* Stone, *supra* note 15, at 57-71. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-23 (2nd ed. 1988)(stating that even a content-neutral restriction is "invalid if it leaves too little breathing space for communicative activity").
46. 452 U.S. 61 (1981).
47. *Id.* at 71.

In other instances the Court has invalidated content-neutral restrictions which suppressed particularly significant media of communication.[48]

Importantly, the Court may stress the unique or significant role that a particular forum or medium plays in effective communication. Although the Court has emphasized that the First Amendment does not guarantee the best or most effective means of communication for a particular speaker,[49] it has shown special solicitude for forms of expression that have been viewed as traditionally necessary for adequate expression, especially for the common person.[50] Because of the constitutional significance of such activities, the Court has required that the state pursue less intrusive restrictions rather than complete bans.[51]

The Court's time, place, and manner analysis has been primarily developed in cases involving various forms of fully protected speech. The regulation of signs and billboards frequently impact both commercial and non-commercial speech, however. The next subsection of this Article will therefore briefly examine commercial speech doctrine.

B. Commercial Speech

Although the early cases did not include commercial speech within the ambit of the First Amendment,[52] the Court extended First Amendment protection to commercial speech in a series of decisions beginning in the mid-1970s. This approach was first suggested in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[53] in which the Supreme Court struck down a statute prohibiting the advertisement of prescription drug prices. The Court specifically rejected the position that commercial speech is outside the First Amendment, recognizing that such speech served an important func-

48. *See, e.g.*, Martin v. Struthers, 319 U.S. 141 (1943)(discussing ban on door-to-door distribution of literature); Schneider v. Town of Irvington, 308 U.S. 147 (1939)(discussing ban on leafletting).

49. *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).

50. *See* Jamison v. Texas, 318 U.S. 413 (1943)(discussing handbills on public streets); Martin v. City of Struthers, 319 U.S. 141 (1943)(discussing door-to-door distribution of literature); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939)(plurality opinion)(discussing free speech in streets and parks); Schneider v. Town of Irvington, 308 U.S. 413 (1939)(discussing handbills on streets).

51. *See* Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. Town of Irvington, 308 U.S. 147 (1939).

52. The nonprotected nature of commercial speech was first established in Valentine v. Chrestensen, 316 U.S. 52 (1942), where the Court held that "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* at 54.

53. 425 U.S. 748 (1976).

tion in disseminating information.[54] Subsequent decisions have affirmed the First Amendment status of commercial speech, applying heightened scrutiny to restrictions on a variety of types of commercial speech including lawyer advertising,[55] contraceptive advertising,[56] "for sale" signs,[57] and trade names.[58]

Although the Supreme Court in these decisions extended First Amendment protection to commercial speech, the Court made clear that commercial speech does not enjoy the same degree of protection as non-commercial speech for several reasons.[59] First, the Court has noted that commercial speech is less likely to be chilled by regulation than other forms of speech because of economic incentives.[60] The Court has also suggested that commercial speech is less central to the primary interests of the First Amendment[61] and has expressed concern that conferring equal status on commercial speech will erode protection for non-commercial speech.[62]

The precise scope of the limited protection afforded commercial speech remains somewhat obscure. The Court has stated that like other types of expression, commercial speech may be subject to reasonable time, place, and manner restrictions.[63] In noting this, the Court has several times suggested that it will employ a standard comparable to other time, place, and manner restrictions to commercial speech, stating any such regulations must serve significant state interests, and "leave open ample alternative channels for communication of the information."[64]

The primary focus of the Court's commercial speech jurisprudence has been the validity of restrictions aimed at particular commercial

54. *Id.* at 771.
55. The Court first addressed the issue of lawyer advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), in which it struck down state limitations on attorney advertising. *See also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)(allowing attorney to solicit business through advertising); *In re* R.M.J., 455 U.S. 191 (1982)(forbidding misleading attorney advertising); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)(limiting attorney's solicitation of business only when used to bait an agreement of representation); *In re* Primus, 436 U.S. 412 (1978)(protecting legal solicitation by nonprofit organizations).
56. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).
57. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).
58. *See* Friedman v. Rogers, 440 U.S. 1 (1979).
59. *See, e.g.*, Posados de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986); Friedman v. Rogers, 440 U.S. 1, 10 (1979).
60. *See* Friedman v. Rogers, 440 U.S. 1, 10 (1979).
61. Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985)(Powell, J.).
62. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
63. Friedman v. Rogers, 440 U.S. 1, 9 (1980)(citation omitted); Virginia State Bd. Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)(citation omitted).
64. *Id.*

messages. The current test employed by the Court in evaluating such restrictions was articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[65] The Court stated synthesized principles from other commercial speech cases and stated a four-part test:

> At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[66]

This test suggests that the Court will apply a form of heightened scrutiny, rather than strict scrutiny, for restrictions on commercial speech content. As a practical matter, generally the Court has more closely scrutinized restrictions on basic informational messages. When the informational element dissipates, scrutiny is relaxed.[67]

Although the Court clearly extends lesser protection to commercial than non-commercial speech, whether this can be a valid basis for distinguishing between the two in the same regulatory scheme is unclear. As will be discussed in the next section, a majority of the Court in *Metromedia* permitted greater restrictions on commercial than non-commercial speech because of the lower protection afforded the former. Such a distinction was recently brought into question in *City of Cincinnati v. Discovery Network, Inc.*,[68] however, where the Court held that a city could not use the lower protection afforded commercial speech as a basis to ban commercial newsracks while permitting non-commercial ones.[69] The decision in *Discovery* and its impact on sign regulation will be discussed more fully in Part VI of this Article.

The next section of this Article will more closely examine the Supreme Court's application of these basic First Amendment principles in the context of sign and billboard regulation. It will examine the Supreme Court's four principal decisions concerning restrictions on signs and billboards: *Linmark Associates v. Township of Willingboro, Metromedia, Inc. v. City of San Diego, Members of City Council v. Taxpayers for Vincent*, and *City of Ladue v. Gilleo*.

65. 447 U.S. 557 (1980).
66. *Id.* at 566.
67. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1980); RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW § 20.31 (1986).
68. 113 S. Ct. 1505 (1993).
69. *Id.* at 1516.

III. THE SUPREME COURT DECISIONS

A. *Linmark Associates v. Township of Willingboro*

The Supreme Court first reviewed a restriction on signs in *Linmark Associates v. Township of Willingboro*.[70] In that case the township of Willingboro had passed an ordinance prohibiting "for sale" signs for the purpose of stopping "white flight" and panic selling.[71] The municipality sought to justify the restriction because the ordinance only regulated one form of expression and because of the city's interest in racial integration.

The Court first addressed the town's assertion that the First Amendment concerns were less significant in this case because the ordinance only restricted one particular manner of communication and therefore did not amount to a complete ban.[72] The Court acknowledged that it had recognized a significant difference between time, place, and manner regulations and complete bans,[73] but rejected the time, place, and manner argument in this case for two reasons. First, the Court questioned whether a ban on "for sale" signs left adequate alternatives for the sale of homes. The Court said that the only two realistic alternatives to signs—newspaper advertisements and real estate agents—involved less autonomy and more expense and therefore might not be considered adequate alternatives to the use of "for sale" signs.[74]

Second, the Court also said the ordinance could not be considered a permissible time, place, or manner restriction because it only restricted "for sale" signs and was therefore not content-neutral.[75] The aesthetic and traffic concerns which might otherwise justify regulation of signs could not justify this restriction because the ordinance did not regulate other signs which generated comparable concerns. Thus, the regulation was aimed not at the particular form or manner of expression, but its content, and could only be justified as such.[76]

Viewing the regulation as content-based, the Court rejected the restriction for two reasons. First, the Court said that the city failed to show that the ban was necessary to further its interest in racial integration.[77] Second, and more importantly, the Court said the primary flaw in the ordinance was that it restricted the free flow of information

70. 431 U.S. 85 (1977).
71. *Id.* at 87-89.
72. *Id.* at 93-94.
73. *Id.* at 93.
74. *Id.*
75. *Id.* at 93-94.
76. *Id.*
77. *Id.* at 95-96.

that was neither false nor misleading. Since such information played an important role in vital decisions, it should not be restricted.[78]

Although *Linmark* involved a restriction on only one type of commercial sign, it is significant because of its treatment of the time, place, and manner analysis. The Court's refusal to characterize the restriction as a permissible time, place, and manner regulation because of the ordinance's content classification reflects the Court's emphasis on content-neutrality and equal access. To the extent that a restriction is based on the typical secondary effects of aesthetics and traffic, the regulation must extend to other signs with comparable concerns.

The Court's suggestion that higher scrutiny might also be required because of a lack of adequate alternatives is somewhat more interesting. In stating that the two realistic alternatives available—newspapers and real estate agents—were unsatisfactory, the Court explained that they involved more cost, provided less autonomy, and may be less effective.[79] Although the Court did not clearly articulate how these factors should be weighed, it suggests some scrutiny of the effectiveness of alternatives. To some extent the inadequacy of alternatives might be explained by the unique association of the sign to the location: the sign communicated something about the property on which it was located. Indeed, in stating that alternatives were less effective, the Court said that alternatives "may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold. . . ."[80]

B. *Metromedia, Inc. v. City of San Diego*

Four years after *Linmark*, the Supreme Court addressed a more broad-based regulation of billboards and signs in *Metromedia, Inc. v. City of San Diego*.[81] The San Diego billboard ordinance reviewed in *Metromedia* prohibited the display of outdoor signs, which was interpreted by the California Supreme Court to apply only to permanent sign structures.[82] The ordinance provided for two broad exceptions, however. First, it permitted on-site signs, which were defined as those designating the name of the owner or identifying goods produced or

78. *Id.* at 96.

79. *Id.* at 93.

80. *Id.*

81. 453 U.S. 490 (1981). For commentary on *Metromedia*, see Aronovsky, *supra* note 2; Theodore V. Blumoff, *After* Metromedia: *Sign Controls and the First Amendment*, 28 ST. LOUIS U. L.J. 171 (1983); Bond, *supra* note 20; Sanders, *supra* note 20.

82. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 494-95 (1981)(plurality opinion).

services rendered on the premises.[83] Second, the ordinance provided for twelve exempted categories of signs, including government signs, historical plaques, religious symbols, "for sale" signs, and temporary political signs.[84] The stated purpose of the ordinance was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the city."[85]

The Supreme Court produced five separate opinions in *Metromedia*, with no opinion gaining a majority of the Court in all its parts.[86] A majority of the Court did agree in its review of the particular restrictions on commercial speech presented in the ordinance,[87] but considerable differences emerged in all other respects. In what Justice Rehnquist termed a "virtual Tower of Babel,"[88] the various opinions disagreed not only about the standard of review but also the impact of the ordinance. For these reasons *Metromedia* yielded only limited definitive principles to guide lower courts and municipalities, especially with regard to restrictions on non-commercial speech.

Justice White's plurality opinion separately reviewed the ordinance's treatment of commercial and non-commercial speech. The opinion first reviewed the restrictions as applied to commercial speech and found them to be constitutional.[89] Justice Stevens joined this portion of the opinion to make it a majority.[90] Emphasizing that the Court has extended less protection to commercial speech than non-commercial speech,[91] Justice White applied the four-part *Central Hudson* test to the commercial speech restrictions.[92]

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83. The ordinance defined on-site signs as those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed . . . ." *Id.* at 494 (plurality opinion).

84. *Id.* at 495 n.3 (plurality opinion).

85. *Id.* at 493 (plurality opinion).

86. Justice White wrote an opinion joined by Justices Marshall, Powell, and Stewart. *Id.* at 493. Justice Brennan wrote an opinion joined by Justice Blackmun. *Id.* at 521. Justice Stevens, *id.* at 540, Chief Justice Burger, *id.* at 555, and Justice Rehnquist, *id.* at 569, wrote separate dissents.

87. Justice Stevens joined Justice White's plurality opinion as it applied to commercial speech, thus constituting a majority of the Court. *Id.* at 541 (Stevens, J., concurring in part). Further, although not officially joining Justice White's opinion, Chief Justice Burger's and Justice Rehnquist's dissenting opinions were in basic agreement with the thrust of the plurality opinion as it applied to commercial speech. *See id.* at 555-70 (dissenting opinion).

88. *Id.* at 569 (Rehnquist, J., dissenting).

89. *Id.* at 504-12 (plurality opinion).

90. *Id.* at 541 (Stevens, J., concurring in part).

91. *Id.* at 504-06 (plurality opinion).

92. *Id.* at 507 (plurality opinion).

In applying the *Central Hudson* test, Justice White's plurality opinion acknowledged that the commercial speech was not false or misleading and thus subject to some First Amendment protection.[93] It proceeded to find that the other prongs of the test were satisfied, however. The plurality found both traffic safety and aesthetic concerns to be substantial government interests justifying regulation.[94] Further, the restrictions were not unnecessarily broad, since the billboards themselves created the traffic and aesthetic concerns. Thus, restricting commercial signs was narrowly tailored to further the state's interests.[95]

The plurality also found that the ordinance met the third requirement of *Central Hudson*, that it "directly advance" the asserted interests. Although acknowledging that this presented a more difficult question, the plurality readily accepted what it viewed as the "common sense" judgment of local governments regarding traffic safety. Similarly, it stated "[i]t is not speculative to recognize that billboards by their very nature . . . can be perceived as an 'aesthetic harm,'" again suggesting a common sense approach to whether it directly advances the state's interest.[96]

Importantly, the plurality also stated that permitting on-site commercial signs while prohibiting off-site commercial signs did not denigrate the asserted state interests. In doing so, the plurality suggested that even if the ordinance is underinclusive by not prohibiting on-site as well as off-site signs, the prohibition of off-site signs is still directly related to the interests of traffic safety and aesthetics.[97] Moreover, the plurality stated that the city could decide that the need to identify on-site premises outweighed its traffic and aesthetic interests.[98] Thus, at least with regard to commercial speech, it appears that local governments have substantial freedom in selecting the scope and manner in which to balance competing interests.

Though upholding the restrictions on commercial speech, the plurality struck down the restrictions as applied to non-commercial speech. The Court cited two reasons for striking these restrictions. First, the plurality said that by permitting on-site commercial signage but prohibiting off-site non-commercial signage, the ordinance prohibited an on-site owner from displaying a non-commercial sign in exactly the same space in which he could display a commercial message. Stressing that the First Amendment provides greater, not lesser, protection for non-commercial speech, the plurality said that the above

93. *Id.* at 507 (plurality opinion).
94. *Id.* at 507-08 (plurality opinion).
95. *Id.* at 508 (plurality opinion).
96. *Id.* at 510 (plurality opinion).
97. *Id.* at 511 (plurality opinion).
98. *Id.* at 512 (plurality opinion).

provision impermissibly reversed the above and was therefore invalid.[99]

Second, the plurality also found the twelve exemptions constitutionally invalid because they were not content neutral. They afforded greater protection to some non-commercial speech than to others.[100] Thus, the plurality, while permitting municipalities to balance competing values with regard to commercial speech, would not extend the same latitude with respect to non-commercial speech.

In contrast to the plurality, Justice Brennan's concurring opinion, joined by Justice Blackmun, viewed the ordinance as having the practical effect of a total ban on billboard use.[101] Justice Brennan applied the standard earlier articulated in *Schad v. Borough of Mount Ephraim*[102] for bans on a complete medium of expression, requiring that such a ban further a sufficiently important interest in a narrowly tailored fashion. He found that the city failed to establish this. Justice Brennan noted that there were no studies supporting the traffic hazard posed by billboards.[103] Further, he found the city failed to show it had undertaken a comprehensive regulation of aesthetic concerns,[104] thus making the ordinance underinclusive. As such, it failed to pass *Schad's* heightened scrutiny.

Because he viewed the ordinance as in effect constituting a total ban on billboards, Justice Brennan did not need to rule on the content-based concerns emphasized by the plurality. Importantly, however, he did not rule out the possibility of exemptions of the type found in *Metromedia*. In dictum, Justice Brennan anticipated that a city "might have special goals the accomplishment of which would conflict with the overall goals addressed by the total billboard ban."[105] In order to allow municipalities to balance these concerns, Brennan suggested that he would permit an exemption only if it "furthers an interest that is at least as important as the interest underlying the total ban, if the exception is no broader than necessary to advance the special goal, and if the exception is narrowly drawn so as to impinge as little as possible on the overall goal."[106]

The three dissenting opinions all viewed the ordinance as essentially a complete, yet permissible ban on billboards. Although writing separate opinions, the dissenters all found the city's interest in traffic safety and aesthetics substantial enough to justify a near complete

99. *Id.* at 513 (plurality opinion).
100. *Id.* at 514-15 (plurality opinion).
101. *Id.* at 526-27 (Brennan, J., concurring).
102. 452 U.S. 61 (1981).
103. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 527 (1981)(Brennan, J., concurring).
104. *Id. at* 528-30 (Brennan, J., concurring).
105. *Id.* at 532 n.10 (Brennan, J., concurring).
106. *Id.* (Brennan, J., concurring).

ban on a single medium of expression.[107] Further, assuming a complete ban, they would allow municipalities to provide content exemptions from regulation as long as they were not viewpoint based.[108] Thus, they would not only allow substantial freedom in balancing interests with regard to commercial speech, as did the plurality, but would apply a similar analysis to non-commercial speech as well.

The variety of opinions and nature of the ordinance in *Metromedia* limit its precedential value. Nevertheless, several principles emerge from the decision in spite of these limitations. First, a clear majority of the Justices held that a municipality could ban off-site commercial signs even though permitting on-site commercial signs.[109] In recognizing this, a majority of the Justices apparently would allow municipalities substantial freedom in balancing the relative competing values involved when regulating commercial signs. Second, a majority of Justices would appear to permit municipalities to place greater restrictions on commercial than non-commercial signs.[110]

The Court was less clear about restrictions on non-commercial speech and the permissibility of content-based distinctions. Although the plurality rejected any content-based distinctions, at least as affecting non-commercial speech, the concurring and dissenting Justices were less rigid. The dissenting Justices would readily accept nonviewpoint distinctions,[111] while the concurring Justices would permit them in narrow circumstances.[112] Further, the opinions also disagreed regarding the validity of a total ban on billboards. Although the three dissenting Justices would accept a total ban,[113] the concur-

107. *Id.* at 541-42 (Stevens, J., dissenting in part); *id.* at 559-60; (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

108. *Id.* at 541-42 (Stevens, J., dissenting in part); *id.* at 562 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

109. *Id.* at 504-06; *id.* at 540 (Stevens, J., concurring in part)(Justice Stevens joined to form a majority on this point).

110. Justice White's plurality opinion, joined by Justice Stevens, continually emphasized the lower protection afforded commercial speech, and held the ordinance valid as applied to commercial speech but invalid as applied to non-commercial speech. *Id.* at 504-12 (plurality opinion); *id.* at 541 (Stevens, J., concurring in part)(Justice Stevens joined to form a majority on this point). Chief Justice Burger's dissent and Justice Rehnquist's dissent would similarly permit greater restrictions on commercial than non-commercial speech, since they both would accept any nonviewpoint based distinctions. *Id.* at 562 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting). *But see* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1514 n.20 (1993)(saying *Metromedia* did not address issue). *See infra* Part VI.A of this Article for a general discussion of the issue.

111. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 541-42 (1981)(Stevens, J., dissenting in part); *id.* at 562 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

112. *Id.* at 532 n.10 (Brennan, J., concurring).

113. *Id.* at 541-42 (Stevens, J., dissenting in part); *id.* at 559-60; (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

ring Justices would subject such a ban to heightened scrutiny because of its perceived suppressive effect on speech. The plurality did not address the issue but in a footnote suggested that a complete ban on billboards would be problematic because it would suppress an entire medium of communication.[114] Despite this footnote, however, the plurality's perception of the ordinance as less than a complete ban despite its extensive reach indicates a willingness to subject signs and billboards to substantial restrictions.

Thus, although establishing a groundwork for analysis, the Court's decision in *Metromedia* left mostly unanswered questions. Three years later, in *Members of City Council v. Taxpayers for Vincent*,[115] the Supreme Court partially addressed some of those issues, though in a slightly different context.

C. *Members of City Council v. Taxpayers for Vincent*

In *Members of City Council v. Taxpayers for Vincent* the Supreme Court reviewed a Los Angeles ordinance which prohibited the posting of any sign, whether commercial or non-commercial, on public property.[116] As in the case of *Metromedia*, the asserted interests behind the ordinance were traffic safety and aesthetics—the "elimination of 'visual clutter.'"[117] The ordinance was challenged by Taxpayers for Vincent, a group which attached cardboard political campaign signs to public utility poles. Thus, the case directly presented the issue of sign restrictions as applied to political speech.

The Supreme Court essentially viewed the ordinance as a time, place, and manner regulation on speech and said it would be upheld if it furthered a "sufficiently substantial" state interest, was no broader than necessary to accomplish that interest, and left ample alternatives for expression.[118] In applying this standard, the Court first found that the city's interests in traffic safety and aesthetics were sufficiently substantial to justify reasonable regulation of First Amendment activities.[119] In this regard the Court apparently relied on the District Court's finding that the ordinance would produce some aesthetic benefit, and therefore focused its discussion on whether this type of interest was sufficient to justify a First Amendment restriction. Relying heavily upon *Metromedia*, the Court held that aesthetic goals could justify First Amendment restrictions.[120]

114. *Id.* at 515 n.20 (plurality opinion).
115. 466 U.S. 789 (1984).
116. *Id.* at 791.
117. *Id.* at 823 (Brennan, J., dissenting).
118. *Id.* at 805-12.
119. *Id.* at 807.
120. *Id.* at 806-07.

The Court also relied on *Metromedia* in holding that the ordinance was narrowly tailored, stating that since the signs themselves produced visual blight, their prohibition did "no more than eliminate the exact source of the evil."[121] The Court distinguished this from instances in which the harm to be avoided was a byproduct of, but severable from, the expression itself.[122]

Importantly, in upholding the ordinance the Court suggested that the municipality had some flexibility to selectively balance competing interests. Although the ordinance was admittedly underinclusive in that it did not also prohibit signs on private property which might be equally unattractive, the Court stated that this did not compromise the asserted state interest. Noting that a similar argument had been rejected in *Metromedia*, the Court stated:

> So here, the validity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. Moreover, by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved, and private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds. Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance.[123]

Finally, the Court also examined whether the ordinance provided adequate alternative means of expression.[124] Emphasizing that the First Amendment does not guarantee the best or most effective means of expression, the Court noted that alternatives existed in this case, such as distributing leaflets on the same site.[125] It also stated that there was no indication that the posting of signs on public property was a uniquely valuable or important means of communication,[126] suggesting that if such were the case, additional First Amendment safeguards might be required. The Court similarly rejected the assertion that utility poles were a public forum requiring some access, stating that there was no showing that a traditional right of access existed for utility poles and that the city had an interest in controlling use of its own property.[127]

Vincent therefore affirms and expands some basic principles from *Metromedia*. Most notably the Court reaffirmed that traffic safety and aesthetics are substantial state interests with regard to regulating First Amendment conduct. Secondly, the Court will permit municipalities freedom in pursuing partial, content-neutral restrictions on

121. *Id.* at 808.
122. *Id.* at 809-10.
123. *Id.* at 811.
124. *Id.* at 812.
125. *Id.*
126. *Id.*
127. *Id.* at 814-15.

non-commercial speech, even if they are underinclusive. The more difficult and troubling aspect of *Vincent*, however, was the ease with which the Court found adequate alternatives. In this respect the opinion is arguably at odds with *Linmark*, where the Court found alternatives to "for sale" signs inadequate. Whereas the Court in *Linmark* emphasized that alternatives would have greater cost and be less effective,[128] the Court in *Vincent* was willing to settle for alternatives that would pose those same problems and thus, arguably suppress speech opportunities. This same issue regarding the adequacy of alternatives for sign restrictions was the primary focus in the Court's most recent sign decision, *City of Ladue v. Gilleo*.[129]

D. *City of Ladue v. Gilleo*

In its most recent decision concerning sign restrictions, *City of Ladue v. Gilleo*, the Court reviewed an ordinance which prohibited all residential signs except "residence identification" signs, "for sale" signs, and safety hazard signs. It also allowed churches and several other establishments to display signs not permitted to be displayed by homeowners.[130] The ordinance was challenged by a citizen who was told that a lawn sign and later a small window sign protesting the war in the Persian Gulf were prohibited.[131]

After reviewing its prior cases involving sign regulations, the Court began its analysis by recounting that an ordinance might be infirm either because it restricted "too little" speech or because it restricted "too much."[132] Although the court of appeals invalidated the ordinance on the former ground because it found the exemptions violated content-neutrality,[133] the Supreme Court instead relied on the second rationale to strike down the ordinance.[134] In doing so, however, the Court noted that content distinctions shed some light on the question of whether the ordinance restricts too much speech, since they may undermine the strength of the state's interest in regulation by demonstrating that the City itself found the interest outweighed in some instances.[135] Implicit in this is the recognition that the question of restricting "too much" involves a weighing of the First Amendment concerns against the asserted state interest.

In proceeding to find that the ban on residential signs restricted "too much" speech, the Court began by noting that the impact on

128. Linmark Assoc. v. Township of Willingboro, 431 U.S. 79, 93 (1977).
129. 114 S. Ct. 2038 (1994).
130. *Id.* at 2040.
131. *Id.*
132. *Id.* at 2043.
133. Ladue v. Gilleo, 986 F.2d 1180, 1182 (8th Cir. 1993), *aff'd*, 114 S. Ct. 2038 (1994).
134. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2044-47 (1994).
135. *Id.* at 2044.

speech was much greater than in *Linmark*, where the Court had held a ban on "for sale" signs invalid.[136] Further, the Court distinguished its decision in *Vincent* where it had upheld a prohibition on posting signs on public property. Although acknowledging that the ban in *Vincent* was quite broad, the Court there had specifically found that placing signs on public property was not a "uniquely valuable and important mode of communication."[137] In contrast, the ordinance in *Ladue* had "almost completely foreclosed a venerable means of communication that is both unique and important."[138]

In analyzing the significance of the restricted speech, the Court first suggested that the restriction might have foreclosed an entire medium of expression and thus require heightened scrutiny. The Court recalled that previous bans on entire media of expression, such as handbill distribution, door-to-door solicitation, and live entertainment, had been held invalid.[139]

Second, and more central to its analysis, the Court stated that even if the restrictions did not foreclose an entire medium of expression, they failed to leave adequate alternative modes of expression and were therefore invalid.[140] In this regard the Court emphasized that signs on a residence are unique because their location provides information about the identity of the speaker, which is a critical component in evaluating a message. Further, residential signs are a convenient and inexpensive form of communication, which for people of modest means have no practical substitute.[141] Finally, the Court emphasized that there is special protection for speech associated with the home, noting that people would be "understandably dismayed" to learn they could not display signs from their homes.[142]

The Court also found it significant that homeowners have strong incentives to maintain property values and avoid visual clutter on their property—incentives that don't exist when placing signs on the property of others.[143] A similar observation was made in *Vincent*, justifying an ordinance which permitted signs on private but not public property by reasoning that "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds."[144] Although self-policing by private property owners does

136. The Court emphasized that in *Linmark* the ordinance applied only to a form of commercial speech, whereas in *Ladue* it prohibited "virtually any 'sign' on [the] property." *Id.* at 2045.
137. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).
138. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994).
139. *Id.*
140. *Id.* at 2046.
141. *Id.*
142. *Id.* at 2047.
143. *Id.* at 2047.
144. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984).

not make a medium uniquely valuable, the Court apparently treats it as a factor in assessing the strength of the state's interest and when deciding whether an ordinance restricts "too much" speech.

The *Ladue* Court struck down the ordinance because it restricted "too much" speech, and therefore, did not address the validity of the content-distinctions on which the court of appeals had invalidated the restriction. In a concurring opinion, however, Justice O'Connor noted the unorthodox approach of the majority in analyzing the suppressive effect of the ordinance rather than examining the content-distinctions, which is usually the first step in analysis.[145] In particular, she suggested that an analysis of the content-distinctions would have presented an opportunity for the Court to clarify some of the particularly problematic aspects of the Court's content-neutrality requirement.[146] Thus, although *Ladue* helped clarify when a sign restriction might suppress "too much" speech, it left unresolved the significant issue of when an ordinance might be invalid because it restricts speech "too little."

The rest of this Article will examine more closely the dual concerns recognized in *Ladue* of restricting "too much" speech and restricting "too little," by focusing on three areas. First, it will briefly discuss when a sign or billboard ordinance might restrict speech "too much" by suppressing significant means of communication. Second, the Article will examine content-neutral restrictions and the extent they may restrict speech "too little" by being underinclusive. Third, it will examine the problem of restricting speech "too little" with regard to content-based distinctions.

IV. SUPPRESSIVE EFFECT AND THE PROBLEM OF "TOO MUCH"

As noted in *Ladue*, a regulation on First Amendment activity will be invalid where it goes too far and regulates "too much" speech.[147] Although lower court decisions have not ordinarily focused on this concern with respect to sign and billboard regulations, the Supreme Court in *Ladue* used this as the basis for invalidating a restriction on political lawn signs.[148] Several lower court decisions have similarly held such restrictions invalid, noting, as did the Supreme Court, the important role such signs played.[149] The applicability of this standard beyond residential lawn signs is still unclear, however.

145. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2047-48 (1994)(O'Connor, J., concurring).
146. *Id.* at 2048 (O'Connor, J., concurring).
147. *Id.* at 2043, 2044-47.
148. *See id.* at 2046-47.
149. *See* Arlington County Republican Comm. v. Arlington County, Va., 983 F.2d 587 (4th Cir. 1993); Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913

By their very nature, sign regulations typically restrict only one type of expression, leaving speakers free to pursue other modes of communication. As indicated by the Court's decision in *Ladue*, however, concerns about "too much" not only concern restrictions on the total quantity of speech, but more typically concern restrictions on uniquely important or significant means of communication. For this reason the Court has consistently required that for restrictions to be valid they must leave adequate or ample alternatives.[150] Where a regulation fails to leave adequate alternatives or intrudes on uniquely important means of communication, the Court will closely scrutinize the regulation, including an assessment of whether the restriction is underinclusive. More often than not the regulation fails such scrutiny.[151]

A review of Supreme Court sign cases indicates that the most likely situation in which an ordinance might restrict "too much" speech is where it eliminates a "uniquely valuable" means of communication, thereby leaving the speaker with inadequate alternatives. The recognition of inadequate alternatives to "for sale" signs in *Linmark* and residential signs in *Ladue* was premised upon the unique function they served for the message conveyed.[152] Conversely, in upholding the restriction in *Vincent*, the Court emphasized that there was no indication that posting signs on public property was a "uniquely valuable or important mode of communication." Indeed, it was on this precise point that the Court in *Ladue* distinguished *Vincent*.[153]

In analyzing whether a particular sign is "uniquely valuable" and deserving of protection, it is helpful to distinguish between the two broad functions served by signs and billboards. First, signs serve as a means by which individual property owners can communicate with others. This might range from simply telling people who a person is to expressing opinions on vital topics. Second, signs also serve as a medium for people unrelated to particular property to communicate ideas or sell products, typically by renting space from others. As such, the sign does not serve as an expression of a particular property owner but

(1977); Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972); State v. Miller, 416 A.2d 821 (N.J. 1980); City of Euclid v. Mabel, 484 N.E.2d 249 (Ohio Ct. App. 1984), *cert. denied*, 474 U.S. 826 (1985).

150. *See, e.g.*, Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).

151. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981); Martin v. City of Struthers, 319 U.S. 141, 144 (1943).

152. See Linmark Assocs. v. Township of Willingboro, 431 U.S. at 79, 93 (1977); City of Ladue v. Gilleo, 114 S. Ct. 2038, 2046 (1994).

153. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994).

rather as a medium of expression unrelated to the ownership of the property.

The Supreme Court sign cases, and in particular *Ladue*, suggest that courts should be most speech protective of signs in the first category—where they are used by a property owner as such. Read together, the cases suggest several reasons. First, signs used by property owners typically have locational significance, either by communicating information unique to the property as in *Linmark* or by providing information about the speaker as in *Ladue*. In contrast, in *Vincent* there was no unique connection between the speaker and placing signs on public utility poles; the message was neither tied to that location nor revealed the identity of the speaker in a significant way. The Court in *Ladue* emphasized this general point when it stated that the precise location of most signs, except for on-site signs, are of less communicative importance than residential signs, explaining that "a commercial advertiser or campaign publicist is likely to be relatively indifferent between one sign site and another."[154]

Second, *Ladue* also emphasized that signs displayed by a private property owner were more likely to be restrained for reasons of self-interest, mitigating the normal aesthetic concerns which accompany signs.[155] Although this does not directly bear on whether such signs are "uniquely valuable," it is relevant to the implicit balancing of interests engaged in when assessing whether speech is restricted "too much". In making this point, the Court in *Ladue* again distinguished residential signs from signs erected "on others' land, in others' neighborhood, or on public property," which would lack an incentive to minimize visual clutter.[156]

For these reasons the Court appears most protective of signs displayed on the property of the displayer. The clearest examples of this category are the residential signs protected in *Ladue*. The question remains how far this right extends to private property ownership beyond the unique context of the home. It might well be argued that *Ladue* supports extending protection to signs on any private property, whether residential or not. Signs on non-residential private property would still serve to identify the speaker as in *Ladue*. Moreover, private non-residential owners would have incentives to minimize aesthetic harm. Indeed, both in discussing the locational significance of residential signs and the incentive to self-regulate, the Court in *Ladue* contrasted residential signs with signs that would appear on the prop-

154. *Id.* at 2046 n.15.

155. *Id.* at 2047.

156. *Id.* The Court made a similar observation in *Vincent*, stating that "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984).

erty of others.[157] This arguably suggests the significance of these concerns turns on the signs' connection to the property owner.

Nevertheless, the *Ladue* holding was also deeply grounded in the constitutional significance of the home for expression. The Court stated that a "special respect for individual liberty in the home has long been a part of our culture and our law," which has "special resonance when the government seeks to constrain a person's ability to *speak* there."[158] Further, people would be "understandably dismayed" to learn they could not display political signs from their homes.[159] For these reasons the case for recognizing the rights of nonresidential property owners to display signs is less compelling.

The issue of whether special protection extends to other private property ownership arises with two types of signs. First are on-site signs, typically used to identify activities occurring on the land. These usually identify commercial activities, such as goods or services, but might also identify various non-commercial activities, such as churches, political organizations, or community associations. The Court in *Ladue* specifically mentioned the communicative importance of the precise location of such signs, along with residential signs, distinguishing them from signs located on others' property.[160] Indeed, in one sense the location of on-site signs has greater communicative importance than the residential signs at issue in *Ladue*, since the content of on-site signs directly relates to the property itself and for which there are no adequate alternatives. At the same time, however, the locational significance of on-site signs are largely limited to identification purposes; for other purposes, such as advertising a product or promoting an idea, they are not unique.

As a practical matter, courts have not had to address this issue, since almost all sign ordinances exempt on-site signs. On balance, though, the unique role such signs play for identification should require some accommodation, since identification certainly serves important speech interests.[161] This is particularly so because the First Amendment interests involved can be adequately met by a one-sign-per-premises limit, which in turn would substantially limit the extent of aesthetic and traffic concerns that might result. When balanced against the First Amendment interests involved, especially the lack of any adequate alternatives to communicate the intended message, some minimum accommodation should be required for on-site signs.

157. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2046 n.15, 2047 (1994).
158. *Id.* at 2047.
159. *Id.*
160. *Id.* at 2046 n.15.
161. *See* Bond, *supra* note 20, at 2506 (arguing that on-site signs should be constitutionally protected because message cannot be communicated elsewhere or through a different medium).

The second type of private property signs that are possibly "uniquely valuable" under *Ladue* would be where the owner of a non-residential facility, such as a commercial or industrial establishment, displays a sign which is not intended to identify the property, but one which expresses the personal convictions of the owner. Such a sign would be off-site, since it does not concern activities on the property, and as such would not necessarily lack adequate alternatives in the same way as on-site signs. However, such signs arguably are "uniquely valuable" in the same way as residential signs in *Ladue*, in that they identify the speaker behind the message. These signs would also provide a cheap and convenient mode of communication, which, though not dispositive, was a factor in *Ladue*.[162] Moreover, as in *Ladue*, property owners would have an incentive to control signs on their own property, thus helping to temper the aesthetic concerns posed by such signs.

Admittedly, however, non-residential signs do not invoke the special solicitude for speech associated with the home, the final factor in *Ladue*. Although owners have some autonomy interest in even non-residential property, the "respect for individual liberty" and special protection for speech is not nearly as substantial for these signs. The case for recognizing signs attendant to non-residential land uses as "uniquely valuable" is therefore not as compelling as with residential signs.

Nonetheless, even the owner of non-residential property has some autonomy interest in that property and would likely be "dismayed" to learn that signs reflecting personal views could not be displayed. This expectation of autonomy, together with the locational significance of such signs, suggest some accommodation should be made for signs on non-residential property.[163] Most certainly the ability to place signs in windows of non-residential establishments should be permitted absent a compelling government interest. Even modest exterior signs should be permitted unless a sufficiently substantial interest can be shown. This is not to say that non-residential property deserves the same level of protection afforded residential signs in *Ladue*. But the locational significance of such signs, the limited autonomy of even nonresidential property ownership, and the naturally restraining effect of posting signs on one's own property, indicate that some level of scrutiny is required when such signs are restricted.

The discussion so far suggests that when a sign serves to express the views of a private property owner, constitutional protection should be afforded to varying degrees. The analysis is much different, however, for signs that serve as a medium for third parties to more

162. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2046 (1994).

163. *See* Bond, *supra* note 20, at 2503 (suggesting that property owners might have right to display any non-commercial message).

broadly disseminate their views. These signs—typically rented for the purpose of communicating various commercial and non-commercial messages—are not locationally significant, since their message does not relate to the property, nor does it identify the speaker. In that sense they more closely resemble the signs in *Vincent*, which had no connection to the property in question.[164] Similarly, the users of such signs would not have the same incentive as private property owners to limit visual clutter.[165]

This analysis is strongly suggested in *Ladue* itself. In assessing whether the ban on residential signs restricted "too much" speech, the Court distinguished them from signs unrelated to the property. In particular, in reflecting on the locational significance of residential signs, the Court noted that the location of other signs was less important, stating that "a commercial advertiser or campaign publicist is likely to be relatively indifferent between one sign site and another."[166] Similarly, when discussing the incentive of private property owners to avoid visual clutter, the Court said such incentives would be lacking for people who erect signs on others' land.[167] For these reasons signs unrelated to property ownership are not "uniquely valuable" and the prohibition of any particular sign at a particular location would certainly not be restricting "too much" speech.

A different concern arises, however, when a broad category of signs are banned throughout a town. In such a situation, the focus changes from the unique value of any particular sign to the value of the category as a whole. Although the value of any particular sign is minimal, access to signs generally as a medium of communication is more substantial. A general prohibition of a broad sign category, such as billboards, might be viewed as foreclosure of an entire medium of expression. The Court has on occasion indicated that such retrictions will be closely scrutinized.[168]

This analysis is most clearly developed in Justice Brennan's concurrence in *Metromedia*, where he interpreted the San Diego ordinance to be a complete ban on billboards, which he considered a distinct medium of expression.[169] As a result, Justice Brennan applied the standard articulated in *Schad v. Borough of Mount Ephraim*[170] for bans on a complete medium of expression, requiring

164. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).
165. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984).
166. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2046 n.15 (1994).
167. *Id.* at 2047.
168. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 71 (1981). *See generally* Stone, *supra* note 15, at 64-67.
169. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 526-27 (1981)(Brennan, J., concurring).
170. 452 U.S. 61 (1981).

that it further a sufficiently substantial interest in a narrowly tailored fashion.[171] Justice Brennan found that the San Diego ordinance failed to establish this, first noting that there were no studies supporting traffic hazards posed by billboards.[172] Further, he argued that the city failed to show it had undertaken a comprehensive regulation of aesthetic concerns in the regulated commercial and industrial districts, and thus any aesthetic benefit in that context was insubstantial.[173] Thus, a complete ban might be valid where the medium of billboards would be clearly incompatible with a particular community.

The plurality in *Metromedia* also hinted in a footnote that a complete ban of billboards might be problematic. Although expressly stating it was not addressing the validity of a complete ban, the Court cited to *Schad* regarding the type of problem a complete ban would pose.[174] The potential problem of restricting a distinct medium of signs was also mentioned in *Ladue*, where the Court suggested that residential signs might constitute a distinct medium of expression, the prohibition of which would require heightened scrutiny. The Court recalled other cases in which the Court struck down prohibitions on various media of expression, such as handbills, pamphlets, and door-to-door distribution of literature.[175] These cases suggested that a broad ban on a type of sign, such as billboards, forecloses an entire medium of expression and requires heightened scrutiny.

There are several problems with this approach, however. First and most obvious is the determination of whether a restriction bans a distinct medium or is merely a regulation of a broader medium.[176] For example, a billboard prohibition can be viewed as a ban on a distinct medium (billboards), or merely a regulation within the broader medium of all signs, some of which would be allowed. For this reason the Court in *Vincent* questioned the utility of trying to decide whether a particular form of expression, in that case posting signs on utility

171. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 528 (1981)(Brennan, J., concurring).

172. *Id.* at 528-30 (Brennan, J., concurring).

173. *Id.* at 530-32 (Brennan, J., concurring).

174. *Id.* at 515 n.20 (plurality).

175. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981)(live entertainment); Martin v. City of Struthers, 319 U.S. 141, 145-49 (1943)(door-to-door distribution of literature); Jamison v. Texas, 318 U.S. 413, 416 (1943)(handbills on public streets); Schneider v. Town of Irvington, 308 U.S. 147, 164-65 (1939)(handbills on public streets)(citing Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938)(distribution of pamphlets)).

176. *See* Williams, *supra* note 13, at 638 n.99 (stating that except for extreme situations, line between a ban and a regulation cannot be easily drawn). *See also*, Stone, *supra* note 15, at 66-67 (1987)(noting difficulty of determination but suggesting still worthwhile).

poles, constituted a discrete medium of communication.[177] Focusing on the unique advantages of a particular mode of expression, rather than on whether it constitutes a separate medium of expression, is often more to the point.

Second, even if billboards or some other sign category are considered a discrete medium, the problems posed by their possible prohibition are not necessarily the same as restrictions on other media. For example, the restricted medium in *Schad* was live entertainment, a unique mode of expression for which there are no adequate alternatives. The communicative message and ideas of Hamlet cannot be adequately captured by radio, newspaper ads, handbills or signs. In contrast, the fundamental message of signs can be readily conveyed through such alternatives, though perhaps with some added expense and inconvenience.[178]

Nor do billboards necessarily provide advantages similar to those found with other protected media, such as leafletting or door-to-door distribution of literature. Although the content expressed through such means might be adaptable to other media, the Court has stressed the important role they play as an inexpensive means of communication, especially for the poor.[179] Signs might play a comparable role from the perspective of an individual landowner[180] but not necessarily from the perspective of a third party seeking a medium of communication. This would be especially true about billboards, which require some expense[181] and typically are used not to express the views of a landowner but rather to advertise. Although billboards certainly offer some advantages in terms of expense and convenience, they lack the types of advantages deemed most important in other cases.

For these reasons communities should be able to impose substantial restrictions on sign categories, billboards in particular, to further aesthetic and traffic safety concerns. This does not mean that substantial restrictions are not subject to some scrutiny. Certainly any restriction must directly advance a significant state interest.[182] For sign regulations this would require that the restriction would appreci-

177. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 815 n.32 (1984).

178. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 562-63 (Burger, C.J., dissenting).

179. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 145-49 (1943)(door-to-door distribution of literature is "essential to the poorly financed causes of little people"); Schneider v. Town of Irvington, 308 U.S. 147, 164-65 (1939). *See also*, TRIBE, *supra* note 45, §§ 12-23 (explaining that First Amendment restrictions that fall with greater force on the poor are scrutinized with special care).

180. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2046 (1994).

181. *See* National Advertising Co. v. City of Bridgeton, 626 F. Supp. 837, 840 (E.D. Mo. 1985)(noting that billboard use not designed for the poor).

182. *See* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510 (1993); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811-12 (1984).

ably further aesthetic goals. Where this can be shown, however, the restriction should be valid.

Under this approach residential communities should be able to impose broad and even complete bans on billboards and similar sign categories. Even Justice Brennan's analysis in *Metromedia* would apparently permit this, since he would evaluate the state's aesthetic interest by how incompatible billboards would be with the surrounding area.[183] Indeed, he stated that some cities would have no problem establishing a substantial aesthetic interest, giving as an example historic Williamsburg, Virginia, where billboards would clearly be out of place.[184] This, of course, is an extreme example, but it illustrates the point: bans should be permissible where the regulated signs, such as billboards, do not fit in with the community. This standard should be clearly met with towns which are almost exclusively residential in character.

More problematic are attempts to ban billboards from larger communities which include commercial and industrial districts, as was the case in *Metromedia*. As noted by Justice Brennan, billboards are "not *necessarily* inconsistent" with such areas and therefore might not distract from their appearance.[185] He would therefore require that the billboard regulation be part of a comprehensive effort to improve the area's appearance.[186] Although this should be sufficient to justify a ban, arguably any set of restrictions that would result in an actual enhancement of aesthetics and appearance should be valid. Indeed, this is essentially the standard applied in *Vincent*,[187] where the Court declined to apply the analysis developed by Justice Brennan in *Metromedia*.[188] Since under normal circumstances a billboard ban does not substantially burden the First Amendment, a similar analysis is appropriate. Where a billboard restriction would have only a negligible impact on appearance, however, it should be invalid.

Thus, the analysis in this section draws a distinction between signs identified with property owners, for which some protection should be afforded, and the broader concept of billboards as a medium for third parties, which deserves less protection. Such a distinction makes

183. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 530-32 (1981)(Brennan, J., concurring).

184. *Id.* at 533-342 (Brennan, J., concurring).

185. *Id.* at 531 (Brennan, J., concurring).

186. *Id.* at 531-33 (Brennan, J., concurring).

187. The court of appeals in *Vincent* had held the restriction on placing signs on public property invalid because the city was not engaged in a comprehensive effort to remove other causes of an unattractive environment. The Supreme Court rejected that approach, and instead only required that the ban actually enhance the city's appearance. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805-08, 807 n.25 (1984).

188. *Id.* at 807 n.25.

sense, since signs associated with property ownership have a locational significance which billboards lack. It also preserves speech where liberty and autonomy concerns are greatest, most notably with residential property, but to lesser degrees with other private property. Finally, as suggested by the Court in *Ladue*, property owners will have an incentive to control any possible abuses, which will lead to a natural balance of aesthetic and speech interests.

V. THE PROBLEM OF "TOO LITTLE": UNDERINCLUSIVE CONTENT-NEUTRAL RESTRICTIONS

A second category of signs which presents regulatory concerns is selective yet content-neutral restrictions. Municipalities, of course, might pursue a variety of content-neutral restrictions on signs and billboards, designed to accommodate communicative needs while furthering state interests in aesthetics and traffic safety. Most basic are regulations restricting the size, type, and placement of signs and billboards. Municipalities will usually also have district-based regulations in which signs and billboards are restricted to certain areas of the city, such as commercial and industrial districts. Finally, and more problematic, are restrictions on the type, number, or duration of signs.

As noted in Part II, the Supreme Court has generally been tolerant of content-neutral time, place and manner restrictions that do not suppress speech. For that reason basic restrictions on the size and height of billboards have proved uncontroversial and have been consistently upheld by lower courts.[189] By their very nature such restrictions have a *de minimus* impact on speech and yet address aesthetic concerns which they may present. Similarly, restrictions on sign placement within a particular district have been viewed as reasonable. For example, requirements that a sign or billboard be placed a certain distance from a street or highway have been upheld.[190] Similarly, restrictions which insist that signs or billboards not appear within a certain distance of a historical site have been upheld as necessary to preserve the special nature of such districts.[191]

189. *See, e.g.*, Scadron v. City of Des Plaines, 734 F. Supp. 1437 (N.D. Ill. 1990), *aff'd*, 989 F.2d 502 (7th Cir. 1993)(size restriction valid); National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300 (Ill. App. Ct., 1990), *cert. denied*, 501 U.S. 1261 (1991)(size restriction valid); City of Albuquerque v. Jackson, 684 P.2d 543 (N.M. Ct. App. 1984)(height restriction valid).

190. *See* Burns v. Barrett, 561 A.2d 1378, 1384 (Conn. 1989)(prohibition on billboards within 500 feet of highway exchange valid); Department of Transp. v. Shiflett, 310 S.E.2d 509, 512 (Ga. 1984)(prohibition on billboards within 660 feet of highways valid).

191. *See* Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992)(signs prohibited within 300 feet of historic site); Corey Outdoor Advertising v. Board of Zon-

A similar, deferential analysis is appropriate for regulations which limit billboard or sign use to certain districts and thus exclude them from others. Most common are ordinances which ban billboards from residential areas but permit them in commercial and industrial districts.[192] Similarly, banning off-site signs in a historic district has been found valid.[193] Such districting regulations are, of course, a clear example of a time, place, and manner regulation which do not ban a particular communicative activity but merely regulate its location. As such, in most instances they represent a reasonable accommodation of speech interests by permitting some billboard use in particular districts.

All of the above regulations would appear to be valid content-neutral restrictions. Potential problems arise, however, with regard to content-neutral restrictions which prohibit or more severely restrict particular types of signs within the same area, thus posing underinclusiveness concerns. Although both *Metromedia* and *Vincent* suggest that municipalities have substantial freedom in structuring underinclusive regulations, lower courts have been in conflict regarding certain types of underinclusive regulations. Most troublesome have been bans or restrictions on portable or temporary signs, as opposed to permanent signs. Municipalities have increasingly placed special regulations or prohibitions on portable signs in recent years, and lower courts have been evenly divided regarding their validity.[194]

As discussed in the previous section, when certain signs are selectively regulated, an initial inquiry is whether the regulation restricts "too much" speech. For example, if a ban on portable signs would include residential lawn signs, it would certainly run afoul of *Ladue*.[195] On the other hand, requiring that on-site identification signs be permanent or prohibiting portable general advertising signs would likely not pose problems of restricting "too much" speech.[196]

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ing Adjustment, 327 S.E.2d 178 (Ga. 1985)(signs prohibited within 300 feet of historic site).

192. *See* Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); State v. Lotze, 593 P.2d 811 (Wash.), *appeal dismissed*, 444 U.S. 921 (1979).

193. *See* Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992).

194. *See supra* note 21.

195. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045-47.

196. Although it might be argued that portable signs constitute a distinct medium of expression and therefore should not be altogether prohibited, see Signs, Inc. v. Orange County, 592 F. Supp. 693, 695 (M.D. Fla. 1983), as discussed in Part IV, characterizing the issue in that way is of little help. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 556-57 (1981)(Burger, C.J., dissenting). Moreover, although portable signs present some cost and convenience benefits, as a general advertising medium they lack the locational significance and self-regulatory nature of the residential signs protected in *Ladue*, and thus are more similar to the unprotected signs in *Vincent*.

Assuming the restriction does not restrict "too much" speech, the issue is whether a valid basis exists for drawing the regulatory distinction. Of course, where it can be established that a particular type of sign—such as portable signs—presents distinct secondary effects in terms of aesthetics or traffic safety, then a valid basis for distinct regulation exists. For example, cities often assert that portable signs present distinct concerns, such as electrical problems, insecure placement, and a greater likelihood that the signs will deteriorate.[197] As a practical matter, however, problems such as these can usually be addressed by less narrow means than a comprehensive ban, such as maintenance or anchoring requirements.[198]

Where there are no distinct secondary effects, however, or where purported secondary effects can be addressed more narrowly, special restrictions or bans on portable signs are arguably underinclusive by addressing only some of the articulated problem. Several decisions have struck down such restrictions, usually stating that the distinction failed to advance the state's interests in aesthetics or traffic safety.[199] In particular, these cases have noted that since portable signs are equally distracting and as visually obnoxious as permanent signs, a local government cannot regulate one and not the other.[200]

In contrast, a number of other courts have upheld the portable/permanent distinction as valid. In doing so courts have reasoned that a separate restriction on portable signs is valid as long as it would have a discernible aesthetic benefit, even if it is underinclusive by not regulating permanent signs.[201] They have also emphasized that municipalities should have the freedom to selectively regulate portable signs in order to partially further their interests. For example, in *Lindsay v. City of San Antonio*,[202] the Fifth Circuit Court of Appeals stated that cities can pursue the "elimination of visual clutter in a piecemeal fashion."[203] Similarly, in *Harnish v. Manatee County*,[204] the Eleventh

197. *See* Barber v. Anchorage, 776 P.2d 1035, 1038 (Alaska 1989); Risner v. City of Wyoming, 383 N.W.2d 226, 228 (Mich. Ct. App. 1985).

198. *See* Dills v. City of Marietta, 674 F.2d 1377, 1382 (11th Cir. 1982); Risner v. City of Wyoming, 383 N.W.2d 226, 228 (Mich. Ct. App. 1985).

199. *See* Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982); Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984), *aff'd*, 755 F.2d 1473 (11th Cir. 1985); Signs, Inc. v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983); All American Sign Rentals, Inc. v. City of Orlando, 592 F. Supp. 85 (M.D. Fla. 1983); Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982); Risner v. City of Wyoming, 383 N.W.2d 226 (Mich. Ct. App. 1985).

200. *See* Dills v. City of Marietta, 674 F.2d 1377, 1381-82 (11th Cir. 1982); Signs, Inc. v. Orange County, 592 F. Supp. 693, 697 (M.D. Fla. 1983).

201. *See* Mobile Sign, Inc. v. Town of Brookhaven, 670 F. Supp. 68, 73 (E.D.N.Y. 1987).

202. 821 F.2d 1103 (5th Cir. 1987).

203. *Id.* at 1109.

204. 783 F.2d 1535 (11th Cir. 1986).

Circuit emphasized that government must have freedom in deciding how much protection to have and how to structure it.[205]

The split in these cases primarily turns on the extent to which a local government can structure partial, underinclusive sign ordinances in order to strike an appropriate balance of regulation.[206] Since the signs themselves generate the aesthetic and traffic concerns supporting regulation, anything more than a *de minimus* regulation of portable signs will advance the state's interest to some degree. The only problem, therefore, is whether the underinclusive nature of the regulation, an area of frequent concern for the Supreme Court,[207] denigrates the asserted interests and undercuts the basis for regulation.

The Supreme Court has emphasized the underinclusive nature of First amendment restrictions in two contexts. First, the Court has emphasized the underinclusive nature of content-based regulations as an additional reason to strike an ordinance down, noting that permitting some speech based on content denigrates the asserted state interests in restricting other speech.[208] Second, the Court has emphasized the underinclusive nature of content-neutral regulations which restrict speech while permitting non-expressive activities with similar problems. For example, striking down a restriction on live entertainment in *Schad v. Borough of Mount Ephraim*,[209] the Court emphasized that the town failed to restrict non-First Amendment activities, such as commercial uses, which would generate comparably objectionable secondary effects. The Court noted that by permitting commercial uses which presented similar objections as the regulated speech the town undermined the significance of any regulatory interest.[210]

These cases might suggest that a municipality cannot structure underinclusive regulations where no basis exists for distinguishing between types of signs because any asserted aesthetic and traffic safety interest in regulation is denigrated by permitting other signs with comparable effects. However, in contrast to the above cases, both *Metromedia* and *Vincent* suggest municipalities have substantial freedom in structuring underinclusive sign and billboard regulations. In

205. *Id.* at 1539.

206. *Compare, e.g.*, Dills v. Cobb County, 593 F. Supp. 170, 173 (N.D. Ga. 1984), *aff'd*, 755 F.2d 1473 (11th Cir. 1985)(emphasizing lack of evidence that portable signs are more displeasing than permanent signs and therefore distinction invalid) *with* Mobile Sign, Inc. v. Town of Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987)(distinction valid because cities can structure underinclusive restrictions).

207. For a general discussion of the Court's treatment of underinclusive restrictions on expression, see William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637 (1993).

208. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1511-15 (1993); Carey v. Brown, 447 U.S. 455, 455-65 (1980).

209. 452 U.S. 61 (1981).

210. *Id.* at 75-76.

Metromedia a majority of the Justices rejected an argument that the city could not permit billboards to be used for on-site advertising and prohibit off-site advertising on aesthetic grounds, since both were equally unattractive. The plurality, joined by Justice Stevens, emphasized that whether the ordinance was underinclusive or not, the prohibition on off-site advertising nevertheless furthered the city's aesthetic objectives.[211] More importantly, it also stated that the city could choose to value one type of commercial speech over another, indicating the latitude to strike a particular balance of speech and aesthetic interests.[212]

The Court's decision in *Vincent* perhaps even more clearly grants municipalities freedom in structuring underinclusive regulations. The regulation upheld in *Vincent* banned signs on public property but permitted signs on private property. Although the restriction was underinclusive in that signs on private property presented the same aesthetic concerns as signs on public property, the Court noted that the city could determine that a private citizen's interest in controlling the use of his own property justifies the disparate treatment.[213] More significantly, the Court also noted that by permitting signs on private property, the city has preserved some speech opportunities.[214] This indicates that attempts to balance speech and aesthetic concerns with content-neutral distinctions are valid. Finally, the Court noted that there was no finding that there were so many signs on private property that a ban on public signs would be inconsequential. This suggests that a prohibition would be invalid if it had no discernable effect on the asserted interests.[215]

The Court's approval of underinclusive regulations in *Metromedia* and *Vincent* makes sense in light of the nature of those regulations as compared to instances where the Court has expressed concern about underinclusive restrictions. The Court has been concerned about underinclusive regulations when discrimination might occur against particular speech because of its content or against speech relative to nonexpressive activities. Because the possibility of improper motives is strong in such situations, the Court is justified in more closely scrutinizing regulations. The Court recognizes that the state's interest is denigrated by the permitted activities.

The regulations in *Metromedia* and *Vincent*, however, did not present the above concerns; rather, by regulating the type and location of signs the local governments merely regulated the manner of speech.

211. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511-12 (1981)(plurality opinion).
212. *See id.*
213. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984).
214. *Id.* at 811.
215. *See id.*

In such a situation the underinclusive nature of a restriction does not suggest an improper motive, but rather a legitimate effort to balance First Amendment and aesthetic concerns. In such a situation, permitting some speech should not be seen as compromising the state's interest but as an effort to provide speech opportunities.[216] Indeed, to punish cities for accommodating speech by such selective regulations might well push cities to more stringent restrictions.

For these reasons local governments should have substantial freedom in structuring content-neutral regulations, even when they are underinclusive. For example, even where portable signs present no distinct secondary concerns, cities should still be able to prohibit them while permitting permanent signs, as a legitimate means of balancing speech and aesthetic interests. The one instance where a content-neutral, underinclusive regulation would be invalid is where the restricted speech is so minor relative to permitted signs that there would be no perceived aesthetic or traffic benefits. Such a restriction would fail to advance any state interest and therefore be an unnecessary restriction on expression.[217]

VI. THE PROBLEM OF "TOO LITTLE": CONTENT-BASED DISTINCTIONS

Although the problem of restricting "too little" speech might occur with content-neutral provisions, it usually occurs in the context of content-based distinctions. The validity of such restrictions has proved to be the most problematic aspect of sign and billboard regulations. Though courts have generally recognized the need for content-neutrality, local governments commonly incorporate various content-distinctions in sign and billboard ordinances. These range from more general distinctions between on-site and off-site signs and commercial and non-commercial signs, to prohibitions and exemptions based on specific content.

The extent to which content-distinctions can be incorporated into a sign ordinance is not altogether clear. Members of the Supreme Court have occasionally shown disagreement with the idea of regulating "too little" speech, suggesting that if a broader restriction is permissible, then permitting some speech is logically preferable to a complete ban. This "lesser is included in the greater" position was in fact advocated by the dissenters in *Metromedia*. They reasoned that if a broader standard was valid, a municipality could draw distinctions, even

216. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 ("a significant opportunity to communicate . . . is preserved" by permitting speech on private property while prohibiting it on public property).

217. *See* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 811-12 (1984).

based on content, as long as it was viewpoint neutral.[218] Several lower courts have similarly held that selective sign regulation is subject only to a viewpoint neutrality requirement,[219] thus permitting wide latitude in structuring sign and billboard ordinances.

Despite these occasional sentiments, the Supreme Court has firmly established that the content-neutrality requirement extends to subject-matter as well as viewpoint distinctions.[220] At the same time, however, the Court has not clearly established the parameters of the content-neutrality requirement as applied to subject-matter restrictions. Both the Court and commentators have noted that subject-matter distinctions do not pose as great a danger to First Amendment values as viewpoint discrimination.[221] For this reason the Court has permitted subject-matter distinctions in special circumstances, such as where there is a captive audience,[222] or in a nonpublic forum.[223] More significantly, the Court has suggested that content-distinctions are valid where they can be justified on a content-neutral basis, such as where distinct secondary effects can be shown.[224]

The uncertainties and tensions surrounding content-based distinctions are perhaps nowhere else more apparent than with regard to selective limitations on signs and billboards. Although content-neutral restrictions provide some means for accommodating speech and

218. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 541-42 (1981)(Stevens, J., dissenting in part); *id.* at 562 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

219. *See* Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992)(stressing viewpoint neutrality); Gannett Outdoor Co. v. City of Troy, 401 N.W.2d 335 (Mich. Ct. App. 1986). *See also* MANDELKER & CUNNINGHAM, LAND USE CONTROLS 664-65 (suggesting that it is unclear whether only viewpoint neutrality is required).

220. The Court first extended content-neutrality to subject-matter distinctions in *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972), where it stated that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." It has since affirmed on a number of occasions that the content-neutrality requirement extends to subject-matter as well as viewpoint distinctions. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 461-62 (1980); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980).

221. *See* Boos v. Barry, 485 U.S. 312, 319 (1988)(O'Connor, J.)(viewpoint bias presents "potential First Amendment ramifications of its own."); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 735 (1980); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

222. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)(upholding ordinance which allowed commercial but prohibited political advertising on public transportation).

223. *See* Cornelius v. The NAACP Legal Defense and Education Fund, 473 U.S. 788 (1985)(government charitable donation campaign); Perry Educ. Ass'n v. Perry Local Educators, 460 U.S. 379 (1983)(internal school mailboxes); Greer v. Spock, 424 U.S. 828 (1976)(military base).

224. *See* City of Renton v. Playtime Theaters, 475 U.S. 41 (1986).

aesthetic interests, ordinances frequently include content related restrictions. This has led to not only differing views on the Court itself,[225] but also a growing body of conflicting lower court decisions.

This section will address the problem of selective billboard and sign regulations, focusing on three general types of content distinctions frequently found in sign ordinances: (1) commercial/non-commercial speech distinctions; (2) on-site/off-site distinctions; and (3) special prohibitions and exemptions for particular speech contents.

A. Commercial/Non-commercial Distinctions

A frequent and important component of sign and billboard ordinances is distinct treatment of commercial and non-commercial speech, with ordinances typically imposing more severe restrictions on commercial speech.[226] The basis for this distinction comes from *Metromedia*, where the Court upheld restrictions as applied to commercial speech but struck the restrictions down as applied to non-commercial speech. Although the decision itself was greatly divided and confusing in most respects, a majority of the Justices appeared to distinguish between commercial and non-commercial speech, permitting greater restrictions on the former.[227]

This commercial/non-commercial distinction is developed in the plurality opinion, joined by Justice Stevens, where it evaluated the ordinance's impact on each type of speech separately.[228] In doing so it emphasized that the Court had consistently distinguished between the level of protection afforded the two types of speech and that commercial speech was afforded lesser protection.[229] It then applied the *Central Hudson* test to uphold the regulation of commercial speech under the ordinance, which permitted on-site but prohibited off-site

225. *See supra* text section III.B, for a discussion of the widely varying views in *Metromedia* regarding the validity of content distinctions.

226. *See, e.g.*, Major Media for the Southeast v. City of Raleigh, 621 F. Supp. 1446, 1448 (E.D.N.C. 1985)(sign ordinance specifies it does not apply to non-commercial speech); Lamar-Orlando Outdoor Advertising v. City of Ormand Beach, 415 So. 2d 1312 (Fla. Dist. Ct. App. 1982)(prohibits commercial speech); City of Cottage Grove v. Ott, 395 N.W.2d 111, 114 (Minn. Ct. App. 1986)(ordinance interpreted to regulate only commercial speech); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388 (N.C. Ct. App. 1982)(ordinance restricts only commercial speech); Singer Supermarkets v. Zoning Bd. of Adjustment, 443 A.2d 1082, 1084 (N.J. Super. Ct. App. Div. 1982)(interprets ordinance as only applying to commercial speech). *But see* Bond, *supra* note 20, at 2514-20 (criticizing commercial/non-commercial distinction as not adequately protecting aesthetic concerns and possibly ignoring unique needs of certain commercial messages).

227. *See supra* note 110.

228. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504-12 (1981); *id.* at 541 (Stevens, J., concurring in part).

229. *See id.* at 504-507 (plurality opinion).

commercial signs.[230] The plurality found the restrictions as applied to non-commercial signs invalid, however.[231]

Lower courts have read *Metromedia* as permitting different restrictions for commercial and non-commercial speech, and in particular permitting local governments at a minimum to ban off-site commercial billboards.[232] Indeed, some courts have interpreted sign ordinances as applying only to commercial speech in order to avoid possible constitutional problems.[233] Although this would appear to give only limited guidance to local governments, what it does give is significant, since off-site commercial billboards undoubtedly pose the greatest aesthetic concern to a community. For this reason, distinguishing between commercial and non-commercial signs has become an important component of sign ordinances, with courts consistently approving various forms of this regulation.[234]

The validity of applying different standards to commercial and non-commercial speech was recently brought into question, however, in *City of Cincinnati v. Discovery Network, Inc.*,[235] where the Supreme Court struck down an ordinance which prohibited commercial but permitted non-commercial news racks. Although there was no showing that the commercial news racks presented any greater aesthetic concern than non-commercial news racks and indeed comprised only a small percentage of the total number, the city attempted to justify the restriction because of the lower First Amendment protection afforded commercial speech.[236]

The Court found the regulation unconstitutional because it failed to establish a reasonable fit under *Central Hudson* between the asserted interests of aesthetics and traffic safety and the selective prohibition of commercial news racks.[237] In particular, the Court rejected the argument that the commercial/non-commercial distinction, standing alone, was a valid basis for regulation where the distinction bore no relationship to the interest asserted.[238] The Court acknowledged that commercial speech is typically subject to greater regulation be-

230. *See id.* at 512 (plurality opinion).
231. *See id.* at 512-17 (plurality opinion).
232. *See, e.g.*, Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 609-10 (9th Cir. 1993). Major Media for the Southeast v. City of Raleigh, 621 F. Supp. 1446, 1448 (E.D.N.C. 1985).
233. *See* City of Cottage Grove v. Ott, 395 N.W.2d 111, 114 (Minn. Ct. App. 1986).
234. *See, e.g.*, Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 609-10 (9th Cir. 1993); Major Media for the Southeast v. City of Raleigh, 621 F. Supp. 1446, 1448 (E.D.N.C. 1985); City of Cottage Grove v. Ott, 395 N.W.2d 111, 114 (Minn. Ct. App. 1986); Singer Supermarkets v. Zoning Bd. of Adjustment, 443 A.2d 1082, 1089 (N.J. Super. Ct. App. Div. 1982).
235. 113 S. Ct. 1505 (1993).
236. *Id.* at 1516.
237. *Id.* at 1510.
238. *Id.* at 1516.

cause the veracity of its content can be assessed, unlike non-commercial speech. Where that is not at issue, however, the Court's analysis seemed to suggest that the state could not assert the "low value" of commercial speech as a basis to impose greater restrictions on commercial than on non-commercial speech.[239]

In an important footnote the Court distinguished *Metromedia*, which had been heavily relied upon by both the city and three dissenting Justices in *Discovery* to justify the distinct treatment of commercial and non-commercial speech found in the ordinance.[240] The majority noted that in *Metromedia* the ordinance itself did not distinguish between commercial and non-commercial speech, but rather between on-site and off-site commercial billboards. As a result, the majority did not read *Metromedia* as saying that a city could distinguish between commercial and non-commercial off-site billboards,[241] as asserted in Chief Justice Rehnquist's *Discovery* dissent.[242] The majority apparently believed that such a distinction would in fact be wrong, which, as noted above, has become a common one in sign and billboard regulations.

As a practical matter, the *Discovery* majority interpretation of *Metromedia* is inaccurate. Although the Court is correct in asserting that the ordinance there did not itself involve a commercial/non-commercial distinction, both the *Metromedia* plurality's reasoning, joined by Justice Stevens, and the *Metromedia* result strongly indicate that municipalities can distinguish between commercial and non-commercial speech. First, the plurality's entire discussion was structured around the ordinance's distinct impact on commercial and non-commercial speech and emphasized in several places the lower protection afforded commercial speech.[243] Since there was no question about the accuracy of the commercial speech in *Metromedia*,[244] the plurality clearly considered that even accurate commercial speech deserved less protection, and was thus a legitimate basis for regulatory distinction. Second, by upholding the ordinance as applied to off-site commercial billboards, but finding it invalid as applied to off-site non-commercial billboards, the plurality's analysis implicitly endorsed the commercial/non-commercial distinction as applied to off-site billboards.

This interpretation of *Metromedia* would also appear consistent with the Court's general assessment of commercial speech claims where it has often noted the lower First Amendment value of commer-

239. *Id.* at 1515-16.
240. *Id.* at 1514 n.20.
241. *Id.*
242. *Id.* at 1521-25 (Rehnquist, C.J., dissenting).
243. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504-12 (1981)(plurality opinion).
244. *See id.* at 507 (plurality opinion).

cial speech.[245] In doing so, the Court has at times offered a variety of reasons for its lesser protection, including its more durable nature based on its economic self-interest,[246] its status as less central to the primary interests of the First Amendment,[247] and the concern that conferring equal status on commercial speech will erode protection for non-commercial speech.[248] All three of these rationales, and the last one in particular, suggest the reasonableness of distinguishing between commercial and non-commercial speech within a regulatory scheme.

The decision in *Discovery*, therefore, presents a possible change in commercial speech jurisprudence, and arguably limits municipalities' abilities to structure commercial sign regulations approved by the Court in *Metromedia*. The Court emphasized in *Discovery*, however, that its holding was "narrow" and that under other circumstances and facts differential treatment of commercial and non-commercial speech might be justified.[249] On this basis it might be argued that *Discovery* should be limited to its facts, which involved a situation where the amount of commercial speech regulated was so small compared to permitted speech that it did not advance the asserted state interest.

Indeed, in holding as it did, the Court in *Discovery* emphasized that any benefit from the regulation was "minimal" and "paltry" because commercial news racks comprised only a small percentage of the total.[250] For this reason there was no reasonable fit between the asserted interests in aesthetics and traffic safety and the restriction. In fact, this lack of a reasonable fit formed the principal basis for the decision.[251] The discussion of the commercial/non-commercial distinction was in response to the city's argument that the commercial/non-commercial distinction, standing alone, could justify the restriction.[252]

This more limited reading of *Discovery* would be consistent with *Metromedia* and subsequent lower court decisions recognizing the commercial/non-commercial distinction. Under this construction, municipalities could place greater restrictions on commercial than non-commercial speech, even where they present comparable aesthetic

245. *See, e.g.*, Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
246. *See* Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).
247. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985)(Powell, J.).
248. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
249. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516 (1993).
250. *Id.* at 1510 (quoting district court and court of appeals). The ordinance would result in the removal of 62 commercial newsracks, while about 1,500-2,000 non-commercial newsracks would remain in place. *Id.*
251. *Id.* at 1510, 1516.
252. *Id.* at 1514-16.

concerns, if such a restriction would in fact advance the asserted state interest. Where the restriction is so minimal as to have no discernible effect on the asserted interest, as in *Discovery*, it would be invalid, since it would fail to directly advance the state interest as required under *Central Hudson*.[253]

Admittedly, this interpretation is not consistent with the broader tone of the opinion and its interpretation of *Metromedia*. On this broader level, *Discovery* would preclude imposing greater restrictions on commercial than non-commercial speech merely on the basis of the lower value of commercial speech. Instead, any distinction must be premised on showing that commercial signs and billboards pose a greater threat to the asserted state interest in aesthetics and traffic safety. In most instances this would be hard to show, since for all practical purposes commercial signs pose the same problems as non-commercial signs.[254]

B. On-site/Off-site Distinction

A second and very common form of content distinction is between on-site and off-site signs, with ordinances commonly permitting the former and restricting the later.[255] Although not an obvious form of content distinction, the regulation in fact turns on the content of the message, *i.e.*, whether it relates to activities on the property or not, and thus is technically content-based.[256] As a practical matter, however, it does not pose the more serious concerns often associated with content regulations.[257]

An initial inquiry, of course, is whether a restriction on off-site signs is invalid because it restricts "too much" speech. Since an off-site sign might well be used to express the opinions of the property owner, it arguably has locational significance because it identifies the speaker. As suggested in Part IV of this Article, some accommodation should normally be required of such signs.

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253. *See* Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980).

254. As noted by the Court in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984), the aesthetic and traffic harms come from the sign itself. Since commercial and non-commercial signs are comparable in appearance, there would be no basis for a distinction.

255. *See, e.g.*, Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); Wheeler v. Comm'r of Highways, 822 F.2d 586 (6th Cir. 1987); Burkhart Advertising, Inc. v. City of Auburn, 786 F. Supp. 721 (N.D. Ind. 1991); Burns v. Barrett, 561 A.2d 1378 (Conn. 1989).

256. *See* Burns v. Barrett, 561 A.2d 1378, 1385 (Conn. 1989).

257. Since the distinction does not turn on a specific viewpoint or even subject-matter, it is very unlikely that the government would use it to control speech or that it would distort public debate.

Analyzing the validity of the on-site/off-site distinction is still important for two reasons, however. First, of course, is that a court might not recognize a protected right to display off-site signs, since they are distinguishable in important respects from the residential signs protected in *Ladue*. Second, even if some right to display off-site signs is recognized, however, that does not mean they can be displayed in the same manner as on-site signs. Any required accommodation of off-site signs to display the views of a property owner would be rather modest, most likely comparable to the types of signs allowed for use by homeowners. Conversely, permissible on-site signs are usually larger and more substantial in nature. Thus, even where accommodation of off-site signs is required, an ordinance might well place greater restrictions on the off-site sign.

The on-site/off-site distinction was approved by a majority of the Court in *Metromedia*, at least as applied to commercial signs.[258] In that case the San Diego ordinance prohibited off-site commercial signs, but permitted on-site commercial signs which identified the activity on the premises. Although the ordinance was thus underinclusive in that it only partially advanced the asserted interests, the *Metromedia* plurality held that the distinction was valid for several reasons. Among them was the recognition that even if underinclusive, the ban on off-site billboards would still advance the state's aesthetic and traffic interests. Further, the plurality stated that San Diego could choose to value one type of commercial speech—on-site signs—more than another type—off-site signs. In particular, it was reasonable for the city to conclude that a commercial enterprise had a stronger interest in identifying a place of business than in advertising elsewhere.[259]

Although upholding the on-site/off-site distinction for commercial speech, the plurality interpreted the exception for on-site signs to apply only to commercial signs. This meant that the ordinance permitted on-site commercial signs, but prohibited on-site non-commercial signs, an inversion of First Amendment principles that was unconstitutional.[260] The plurality's interpretation of the ordinance is questionable, however, since the ordinance can be read to permit a non-commercial activity to have an on-site identification sign; the only clear prohibition was for off-site signs, *i.e.*, those which did not relate

258. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511-12 (1981)(plurality opinion); *id.* at 541-42 (Stevens, J., concurring in part). The reasoning behind Chief Justice Burger's and then Justice Rehnquist's dissents indicates that they also approved of the distinction. *See id.* at 562 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

259. *See id.* at 511-12 (plurality opinion).

260. *See id.* at 513 (plurality opinion).

to activities on the premises.[261] Nevertheless, under the plurality's interpretation the ordinance would be invalid.

Although lower courts have generally upheld distinctions between on-site and off-site commercial signs, a significant split of authority has arisen with regard to the distinction as applied to non-commercial signs. At issue is whether an ordinance which limits on-site messages—whether commercial or non-commercial—to activities associated with the premises discriminates against non-commercial speech.[262] For example, such an ordinance would permit non-commercial activities, such as hospitals and political organizations, to have on-site identification signs. However, neither commercial or non-commercial uses could have non-commercial messages unrelated to the activity conducted on the premises.[263]

The problem with the above ordinance is that the permissibility of a message potentially turns on its content. In particular, the owner of a commercial establishment would be prohibited from displaying a non-commercial message unrelated to the premises. Thus, a fast food restaurant could advertise its product, but could not have a sign such as "Save the Whales," "Get Out of the U.N.," or supporting a particular political candidate. This arguably runs afoul of the plurality's analysis in *Metromedia*, where it said:

> In-so-far as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages.[264]

In other words, once a decision is made to permit a sign at a particular location, the government cannot dictate what it says.

A number of municipalities have responded to this perceived problem by including "substitution clauses" which provide that any on-site sign authorized under an ordinance may instead contain an off-site,

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261. The on-site exception in *Metromedia* allowed "signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." *Id.* at 493 n.1 (plurality opinion). Justice Brennan interpreted this exemption as applying equally to non-commercial speech, stating "[i]f the occupant is an enterprise usually associated with non-commercial speech, the substance of the identifying sign would be non-commercial." *Id.* at 536 (Brennan, J., concurring).

262. *See* Bond, *supra* note 20, at 2482, 2500-07 (stating that this is the primary issue facing courts after *Metromedia* and discussing the judicial split regarding the issue).

263. *See, e.g.*, Wheeler v. Comm'r of Highways, 822 F.2d 586 (6th Cir. 1987); Burns v. Barrett, 561 A.2d 1378, 1385 (Conn. 1989).

264. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981)(plurality opinion).

non-commercial message in lieu of the permitted on-site message.[265] Thus, there is no discrimination under the ordinance since once a property owner qualifies to have an on-site sign, that owner can choose any other message instead. Such substitution clauses also do not interfere with a city's effort to advance aesthetic and traffic safety concerns, since messages are in lieu of, not in addition to, permitted signs.

Courts are split regarding whether an ordinance restricting signs to activities located on the premises violates the First Amendment absent a substitution clause. Several courts have struck down such ordinances, stating that they violated the content-neutrality requirement by limiting what the property owner could say.[266] Several other courts, in upholding ordinances which included substitution clauses, strongly suggested that the ordinance would have been invalid without the substitution clause.[267]

An equal number of courts, however, have upheld provisions which limited messages to those describing activities conducted on-site, even absent a substitution clause.[268] In so holding, those courts have emphasized that such ordinances treat commercial and non-commercial speech the same; a non-commercial enterprise can display a sign relating to activities on the premises in the same way that a commercial enterprise can.[269] Thus, the only real distinction that is drawn is based on location and only indirectly touches on content.

This latter position would seem to be the better one for two reasons. First, although the on-site/off-site distinction involves a form of content regulation, it is attenuated at best. The ordinance itself treats all content the same, with any content distinctions turning on the nature of the activity at the particular site. In such a situation the nor-

265. *See, e.g.*, Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336, 1339 (D. Md. 1993); City of Salinas v. Ryan Outdoor Advertising Inc., 234 Cal. Rptr. 619, 626-27 (Cal. Ct. App. 1987).

266. *See* Burkhart Advertising, Inc. v. Auburn, 786 F. Supp. 721, 732 (N.D. Ind. 1991); National Advertising Co. v. Town of Babylon, 703 F. Supp. 228 (E.D.N.Y. 1989); Metromedia v. Mayor of Baltimore, 538 F. Supp. 1183, 1187 (D. Md. 1982).

267. *See* Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993); National Advertising Co. v. Chicago, 788 F. Supp. 994, 998 (N.D. Ill. 1991); City of Salinas v. Ryan Outdoor Advertising, Inc., 234 Cal. Rptr. 619, 626-27 (Cal. Ct. App. 1987).

268. *See* Rappa v. New Castle County, 18 F.3d 1043, 1067 (3rd Cir. 1994); Messer v. City of Douglasville, 975 F.2d 1505, 1509-10 (11th Cir. 1992); Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987); National Advertising Co. v. Chicago, 788 F. Supp. 994, 997-98 (N.D. Ill. 1991); Burns v. Barrett, 561 A.2d 1378, 1385 (Conn. 1989); City and County of San Francisco v. Eller Outdoor Advertising, 237 Cal. Rptr. 815, 825 (Cal. Ct. App. 1987).

269. *See* Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992); Burns v. Barrett, 561 A.2d 1378, 1385 (Conn. 1989).

mal concerns posed by content distinctions are barely implicated.[270] There is no fear of censorship or pretextual regulation,[271] since the distinction makes no reference to specific content. Similarly, such a distinction would not distort public debate,[272] since it would not disproportionately affect any particular topic or subject-matter.

Second, the unique and essential role that on-site signs play in identifying activities distinguishes them from off-site signs and justifies distinct treatment. There is little doubt that on-site signs lack adequate alternatives to a much greater extent than do off-site messages. The Court's special solicitude for expressive activities that lack adequate alternatives[273] suggests that municipalities should be able to accommodate signs that lack adequate alternatives. Further, the lack of adequate alternatives for on-site signs provides a content-neutral reference point for regulation, which takes it outside the content-based analysis.[274]

C. Exemptions and Prohibitions

The last and most problematic form of content distinction are ordinances which either specifically prohibit or exempt non-commercial signs based on their content. The most common of these are ordinances which generally prohibit signs or billboards in certain areas, subject to various content-based exemptions.[275] Although there may be a variety of reasons for this, including the perceived relative values of the particular speech, these distinctions often are attempts to ac-

270. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 200-33 (1983)(suggesting four possible reasons for stringent review of content-based restrictions: (1) the desire for equal treatment of speech content; (2) recognition that speech cannot be restricted because of its communicative impact (*i.e.*, how people will react to it); (3) distortion of public debate; (4) improper motivation (*i.e.*, the government cannot prohibit speech because it disapproves of the speaker's ideas)).

271. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980)("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' ").

272. *Id.* at 538 ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."). *See also* Rappa v. New Castle County, 18 F.3d 1043, 1062 (3rd. Cir. 1994)(content distinctions might distort public debate).

273. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977); Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State of New Jersey, 308 U.S. 147 (1939).

274. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). *See also* Boos v. Barry, 485 U.S. 312, 320-21 (1988)(O'Connor, J.)(discussing "secondary effects" analysis).

275. *See, e.g.*, Rappa v. New Castle County, 18 F.3d 1043 (3rd Cir. 1994); Goward v. City of Minneapolis, 456 N.W.2d 460 (Minn. Ct. App. 1990); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52 (Colo. 1981).

commodate the particular needs of certain speech without altogether losing the benefits of regulation. Thus, where a town would like to generally ban signs, but recognizes a unique need for certain signs, it frequently chooses to exempt a few signs rather than opt for the "all or nothing" approach that strict content-neutrality would require.

Despite the obvious appeal of such ordinances, by drawing distinctions based on non-commercial content they touch upon core First Amendment concerns. The Supreme Court has increasingly held such content-based regulations invalid, making it in recent years the Court's primary analytical tool.[276] At the same time the Court has indicated that special circumstances might justify limited forms of subject-matter distinctions,[277] providing some ambiguity in what is often considered a clear-cut area of First Amendment jurisprudence.

This ambiguity is perhaps no more apparent than with respect to sign and billboard ordinances. As noted in Part III, the plurality in *Metromedia* emphasized the need for strict content-neutrality when it held not only that the ordinance's perceived preference for commercial over non-commercial speech was invalid, but also that the various non-commercial speech exemptions were invalid.[278] However, the other five Justices in *Metromedia* would not have ruled out some content distinctions. The three dissenting Justices apparently would allow any subject-matter distinctions, prohibiting only viewpoint distinctions.[279] Justices Brennan and Blackmun, however, suggested a tighter standard, stating that they would permit subject-matter exemptions only in narrowly drawn circumstances.[280]

This tension regarding subject-matter distinctions is also apparent in *Vincent*, where the Court suggested two different standards regarding content-neutrality. At the beginning of the opinion the Court analyzed the ordinance under a viewpoint neutrality standard, suggesting a mode of analysis similar to the *Metromedia* dissents.[281] Later in the opinion, however, the Court rejected an argument that an exemption should be provided for political signs, noting that such an exemption

276. *See, e.g.*, Boss v. Barry, 485 U.S. 312, 318-19 (1988)(O'Connor, J.); Carey v. Brown, 447 U.S. 455, 462 (1980); Stone, *supra* note 270, at 189; Williams, *supra* note 13, at 616-17.

277. *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). *See generally* Farber, *supra* note 221, at 727-31; Stone, *supra* note 221.

278. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512-17 (1981)(plurality opinion).

279. *Id.* at 541-42 (Stevens, J., dissenting in part); *id.* at 562 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

280. *Id.* at 532 n.10 (Brennan, J., concurring).

281. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). Several courts and commentators have interpreted *Vincent* as requiring only viewpoint neutrality. *See* Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992); Gannett Outdoor Co. v. City of Troy, 401 N.W.2d 335, 340 (Mich. Ct. App. 1986); DANIEL R. MANDELKER, LAND USE LAW § 11.15 (2nd ed. 1988).

might violate content-neutrality absent a showing of unique need.[282] The Court proceeded to undercut this more rigorous standard, however, by acknowledging that the ordinance contained two exemptions for government signs, which it declined to review.[283]

Similarly, lower court decisions reflect the tensions inherent in reviewing content-based sign exemptions and prohibitions. Courts often state that any exemptions violate the First Amendment requirement of content-neutrality,[284] usually citing to the plurality opinion in *Metromedia*.[285] Conversely, several decisions have held or stated that the First Amendment permits some limited forms of exemptions. Although generally adhering to the requirements of content-neutrality, these courts have emphasized the necessity of allowing some minor exemptions where they can be justified apart from their content, such as where a relationship exists between sign content and a specific location.[286]

The tension in these cases flow from the dilemma local governments face when trying to structure a truly content-neutral ordinance. Although there might be strong aesthetic and traffic interests supporting sign limitations, there are almost always some limited categories of signs which are deemed desirable to have, such as directional signs, speed signs, construction signs, and government signs. Strict content-neutrality requires an "all or nothing" approach, however, because once an exemption is created for one sign all others must also be allowed. This puts local governments in the difficult position of foregoing either the aesthetic and traffic safety concerns behind a general ban, or the important interests served by a limited number of uniquely valuable signs.[287]

The Supreme Court has indicated that although most content distinctions will be invalid, a limited basis for distinctions exists when they can be justified on content-neutral terms. This "content-neutral" grounds analysis was developed primarily in *City of Renton v. Play-*

282. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 815-16 (1984).
283. *Id.* at 817 n.34.
284. *See, e.g.*, National Advertising Co. v. Town of Babylon, 900 F.2d 551, 557 (2nd Cir. 1990); Dimmitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993); Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336 (D. Md. 1993).
285. *See, e.g.*, National Advertising Co. v. Town of Babylon, 900 F.2d 551, 557 (2nd Cir. 1990); Jackson v. City Council of Charlottesville, 659 F. Supp. 470, 473 (W.D. Va. 1987).
286. *See* Rappa v. New Castle County, 18 F.3d 1043 (3rd Cir. 1994); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52 (Colo. 1981). *See also* Gannett Outdoor Co. v. City of Troy, 401 N.W.2d 335, 340-42 nn.9 and 17 (Mich. Ct. App. 1986).
287. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, at 532 n.10 (1981)(Brennan, J., concurring)(Noting that a local government might have some special goals furthered by limited exemptions, Justice Brennan stated, "It would make little sense to say that a city has an all-or-nothing proposition—either ban all billboards or none at all.").

time Theaters, Inc.,[288] where the Court held that distinct secondary effects could justify different restrictions. In establishing this secondary effects analysis, the Court said that a regulation is content-neutral if it is "justified without reference to the content of the regulated speech."[289] Although the Court has not applied this outside the context of *Renton*, it has in recent cases cited the standard with approval, suggesting its applicability to any type of speech.[290] Moreover, in striking down content distinctions the Court has noted on occasion that the exempted speech was not unique, suggesting that if there were unique circumstances, content-based distinctions might be valid.[291]

Two possible grounds for content-based sign distinctions exist on this basis. The first is that discussed in *Renton*, where particular sign contents would generate distinct secondary effects from other sign messages. Thus, where particular sign subject-matter can be shown to generate distinct secondary effects in terms of aesthetics or traffic safety, a valid basis for regulation arguably exists.

As a practical matter, however, any distinct secondary effects accompanying signs would be hard to establish. The Court has indicated that any distinct secondary effects will need to be established by clear evidence. The aesthetic and traffic concerns supporting sign regulation do not generally vary with content, however, since the signs themselves pose the problem in question.[292] Occasional arguments that particular signs have unique secondary effects, such as political

288. 475 U.S. 41 (1986).

289. *Id.* at 48 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

290. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992)(discussing "secondary effects" test). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(stating that a regulation is content-neutral if justified without reference to the speech); Williams, *supra* note 13, at 631-35 (analyzing how in recent years the Court's primary meaning of content discrimination has become that reflected in *Renton*).

291. For example, in *Carey v. Brown*, 447 U.S. 455 (1980), the Court struck down an ordinance which prohibited residential picketing but exempted peaceful labor picketing by people employed at the residence. In finding this exemption invalid, the Court emphasized that there is "nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern." *Id.* at 465. The Court also carefully examined the possibility that the exemption might be justified because it was a form of speech "peculiarly appropriate to residential neighborhoods *and cannot effectively be exercised elsewhere*." *Id.* at 468 n.13. It stated, however, that there were other contents equally appropriate to residential neighborhoods and therefore the exemption could not be justified on that basis. *Id. See also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984)(in rejecting exemption for campaign signs, Court emphasized that there was no showing that "a uniquely important form of communication has been abridged for the categories of expression engaged in.").

292. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).

signs being more likely to provoke drivers to drive on lawns to run them over, have been properly rejected by courts.[293] As a general matter the harm comes from the sign itself, thus making it very difficult to show distinct secondary effects.

One plausible argument that has been made to show distinct secondary effects is that certain signs are more likely to proliferate because they are not limited in nature and thus quantitatively have distinct secondary effects. For example, in *Ladue* the city attempted to justify content distinctions by arguing that signs banned under the ordinance, such as political signs, are prone to "proliferate," while permitted signs, such as residence identification signs and "for sale" signs, are naturally limited in number.[294] Therefore, although the qualitative secondary effects from any particular sign are the same, quantitatively they would differ.

Because the Supreme Court in *Ladue* held that residential signs were uniquely important means of communication and could not be prohibited, it did not address the secondary effects argument. To the extent that evidence is offered which would establish such effects, the argument may have some validity. The problem, however, is that a numerical limitation on signs that tend to proliferate would be an equally effective and less intrusive means of regulation.[295] Like most other secondary effects arguments seeking to justify content distinctions in sign ordinances, it should therefore be rejected.

A second and more likely ground on which to justify content distinctions is the unique need and lack of alternatives for certain sign content, in particular those that have a unique relationship with the property.[296] As is true with the secondary effects analysis, a showing of unique need provides a content-neutral reference on which to justify a distinction. Such an approach would appear to be implicit under the secondary effects analysis, since the distinction is made by reference to a content-neutral basis, for example the unique relationship of the sign to the property.[297]

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293. City of Euclid v. Mabel, 484 N.E.2d 249, 254-55 (Ohio Ct. App. 1984).

294. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2043-44 (1994). Residence identification signs and "for sale" signs are naturally limited in number because you only need one to accomplish their purpose. In contrast, political signs are not so naturally limited, since there might be numerous candidates or causes that a person supports.

295. A numerical limitation would be an effective way to address the distinct secondary effect of proliferation. A numerical limitation on certain signs, such as residential signs, might well restrict "too much" speech, however, and therefore be invalid. The Court in *Ladue* made clear that even if a restriction was justified by distinct secondary effects, it must still provide adequate alternatives to be valid. *Id. at* 2044 n.11.

296. *See* Bond, *supra* note 20, at 2520-22.

297. *See also* Carey v. Brown, 447 U.S. 455, 468 n.13 (1980)(suggesting that unique need might be a basis for an exemption).

The Court's decisions in *Vincent* and *Metromedia* also suggest the possibility of limited exemptions based on unique need. In *Vincent* the Court rejected an argument that the ordinance could have been more narrowly drawn by exempting political campaign signs, stating that such an exemption was not required and indeed might itself violate content-neutrality.[298] In reaching this conclusion it emphasized that there had been no finding that campaign signs do not generate the same concerns as other signs, or that "a uniquely important form of communication has been abridged for the categories of expression engaged in" by the plaintiff.[299] This suggests a special exemption might have been permitted where signs serve a unique function for the speech in question.

A majority of the Justices in *Metromedia* also indicated that some exemptions might be valid. The three dissenting Justices would permit substantial exemptions as long as they were not viewpoint neutral,[300] a position that is admittedly inconsistent with current content-neutrality standards.[301] Justice Brennan's concurrence, joined by Justice Blackmun, proposed a much more narrow standard in dictum, stating that if a municipality could justify a total ban, he would allow an exception "if it directly furthers an interest that is at least as important as the interest underlying the total ban, if the exception is no broader than necessary to advance the special goal, and if the exception is narrowly drawn so as to impinge as little as possible on the overall goal."[302]

Both *Vincent* and *Metromedia* lend support, therefore, to the position that limited exemptions might be valid, a position consistent with the broader "content-neutrality" analysis outlined in *Renton*. However, Justice Brennan's proposed approach, though sympathetic to the competing concerns involved, is problematic because it permits cities to exempt speech deemed important enough to outweigh the interests supporting the general ban. This appears to invite cities to evaluate the value of certain speech, an impermissible basis for regulation.[303]

A more appropriate standard is suggested by the language in *Vincent*, where the Court asked whether the sign was "a uniquely important form of communication . . . for the categories of expression

298. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 815-16 (1984).

299. *Id.* at 816.

300. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 541-42 (1981)(Stevens, J., dissenting in part); *id.* at 562 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

301. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536-38 (1980); Carey v. Brown, 447 U.S. 455, 462 (1980).

302. Consolidated Edison Co. v. Public Serv. Comm'n, 477 U.S. 530, 532 n.10 (Brennan, J., concurring).

303. Rappa v. New Castle County, 18 F.3d 1043, 1064 (3rd Cir. 1994).

engaged in."[304] A more precise version of this standard was recently pronounced by the Third Circuit in *Rappa v. New Castle County*,[305] where it stated that an exemption was justified where there is a significant relationship between the content of particular speech and a specific location.[306] A sign serves a uniquely important means of communication in such a situation for which there are often no adequate alternatives. For example, directional signs, speed limit signs, and street addresses lack adequate alternatives; the signs are uniquely important means of communicating the respective messages which cannot be duplicated by other means.[307]

The case for such exemptions is most compelling where courts have recognized a constitutional right to display the sign because of a lack of adequate alternatives. For example, the Supreme Court has indicated that homeowners have a right to display "for sale" signs[308] and, after *Ladue*, ideological lawn signs.[309] Thus, a city should be free to exempt such signs without violating content-neutrality, contrary to the plurality's analysis in *Metromedia*.[310] Any other result would put cities in an impossible Catch-22.

Even where the sign might not be constitutionally compelled, as with government direction signs or speed limit signs, exemptions should be permitted based upon the unique relationship of the sign to the property. Although in some instances such signs might be justified under strict scrutiny in any event, as a practical matter the site-specific nature of the sign provides a content-neutral justification for an exemption. It makes little sense to require municipalities to take an "all or nothing" approach in such cases. Moreover, limited exemptions of this type pose little threat to the concerns supporting content neutrality. In particular, the requirement that the speech relate to the property provides a nonspeech reference point, thus avoiding problems of improper motive or censorship.[311] Further, public debate

304. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984).

305. 18 F.3d 1043 (3rd Cir. 1994).

306. *Id.* at 1065. *See also* Bond, *supra* note 20, at 2520-24 (arguing that government can draw content distinctions based on identifying/nonidentifying function of a sign).

307. Rappa v. New Castle County, 18 F.3d 1063, 1064 (3rd Cir. 1994).

308. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).

309. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994).

310. Included among the exemptions in Metromedia were "for sale" signs and temporary political signs. Courts had previously required some accommodation of both signs because of their unique nature. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977)("for sale" signs); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976)(temporary political signs). Despite this required accommodation, the plurality in *Metromedia, Inc. v. City of San Diego* indicated an exemption of such signs would violate content-neutrality.

311. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980). *See also* Stone, *supra* note 270, at 227-33.

is not distorted; rather, by exempting signs with no or inferior alternatives debate is equalized.[312]

Beyond these limited exceptions, however, most other forms of content-based distinctions should be invalid, a result usually reached by lower courts. Particularly problematic would be ordinances which selectively prohibit some speech content while permitting most other signs. As noted earlier it would be very difficult to establish distinct secondary effects for particular sign contents. Further, such a regulatory scheme could not be justified by site dependent considerations, since it would inevitably include numerous signs that would not meet that test. Thus, attempts to selectively prohibit certain content should be and have been struck down by courts.[313]

One final and particularly problematic type of content-based distinction commonly found in ordinances are durational limits on certain signs, most notably political campaign signs.[314] Ordinances will often limit the number of days campaign signs can be displayed prior to an election and require that they be removed within a certain time after the election.[315] On their face such restrictions appear quite reasonable. They are narrowly drawn restrictions designed to accommodate speech interests when most significant, and yet still further aesthetic and traffic safety concerns. As such, they reflect a careful calibration of the competing interests involved in sign regulation.

There are two significant concerns raised by durational limits, however. First, limits on campaign signs potentially restrict "too much" speech by prohibiting campaign related speech during certain periods.[316] Although limits might seem appropriate because the speech concerns an event set in time, the utility of the speech is not necessarily so limited. Not only might significant time be needed to persuade, but more fundamentally campaign signs are a way to communicate a person's own beliefs and philosophy by allegiance to a particular candidate. This purpose is not limited in time prior to an election.

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312. Rappa v. New Castle County, 18 F.3d 1043, 1064 (3rd Cir. 1994).

313. *See* Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972)(political signs); City of Euclid v. Mabel, 484 N.E.2d 249, 252 (Ohio Ct. App. 1984)(political signs).

314. *See, e.g.*, City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52, 54-5 (N.D. Cal. 1982)(limited to 60 days before election); Orazio v. Town of North Hempstead, 426 F. Supp. 1144 (E.D.N.Y. 1977); Temple Baptist Church v. City of Albuquerque, 646 P.2d 565 (N.M. 1982); Van v. Travel Info. Council, 628 P.2d 1217 (Or. Ct. App. 1981). *See also* Blumoff, *supra* note 80, at 194-96 (discussing durational requirements).

315. *See, e.g.*, City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52, 54-5 (N.D. Cal. 1982)(60 day pre-election limit and removal within 14 days).

316. *Id.* at 59-60. *See also* Van v. Travel Info. Council, 628 P.2d 1217, 1226 (Or. Ct. App. 1981).

Second, durational limitations on campaign signs possibly violate content-neutrality by imposing restrictions on campaign signs that are not imposed on other sign contents. This is particularly true where the limit is only on campaign signs and not part of a broader durational limit on all time-related events. In such an instance, specific limits on campaign signs discriminate on the basis of content without a content-neutral justification and would be invalid.[317]

Durational limits on campaign signs might not violate content-neutrality, however, where they are part of a broad limit on all time-related events, such as advertising a sale, musical performance, theater showing or special meeting.[318] In such a case the time reference of the various contents might serve as a content-neutral reference point. As noted above, however, a durational restriction on campaign signs might still restrict "too much" speech.

VII. CONCLUSION

Local efforts at sign and billboard regulation present cities with the difficult task of furthering aesthetic and traffic safety goals while accommodating First Amendment rights. In doing so they must avoid the two problems identified in *City of Ladue v. Gilleo*: restricting "too much" speech and restricting "too little." As evidenced by a large and often conflicting body of caselaw in recent years, this is no easy task.

Ladue itself suggests that cities must be most concerned about restricting "too much" speech when regulating signs attendant to private property ownership. Although this concern is strongest regarding residential signs, it also exists to varying degrees with on-site signs and off-site nonresidential signs used to express the views of a property owner. Conversely, signs used in their role as a medium for third parties are deserving of less protection. Even broad restrictions on a category of signs, such as billboards, should be valid as long as the city's aesthetic interest is appreciably advanced.

Problems of regulating "too little" speech come in two forms. Although some courts have struck down content-neutral restrictions on portable signs as being underinclusive, both *Metromedia* and *Vincent* indicate that cities should have substantial freedom in structuring content-neutral underinclusive regulations as long as they advance the asserted interests. Cities have far less freedom with regard to content-based distinctions, however. Content distinctions should be permitted where they can be justified on a content-neutral basis, in particular where the sign is specially related to the property.

317. City of Antioch v. Candidates Outdoor Graphic Serv., 557 F. Supp. 52, 57-58 (N.D. Cal. 1981).

318. *Id.* at 58 (violates content-neutrality by placing time limits on political campaign signs but not on signs for "upcoming commercial, charitable or civic events").

Other than this limited exception, content-based distinctions should be invalid.